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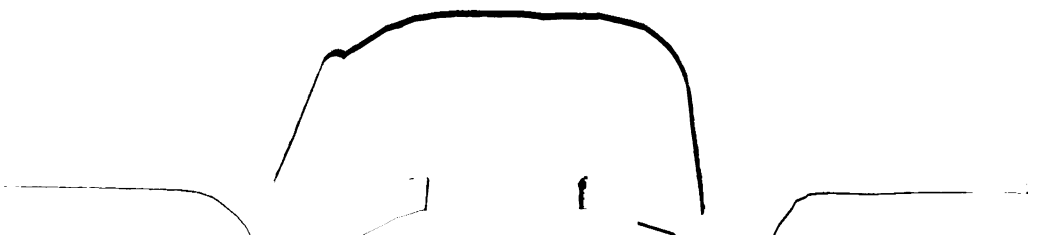
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THE LAW
OF
MINES AND MINING
IN
THE UNITED STATES.

By the Same Author.

**A DESCRIPTION OF MINERALS
OF
COMMERCIAL VALUE.**

By DANIEL MOREAU BARRINGER.

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THE LAW
OF
MINES AND MINING
IN
THE UNITED STATES.

BY
DANIEL MOREAU BARRINGER, A.M., LL.B.
AND
JOHN STOKES ADAMS, A.B., LL.B.
OF THE PHILADELPHIA BAR.

ST. PAUL, MINN.
KEEFE-DAVIDSON COMPANY.
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AND

JOHN STOKES ADAMS.

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TO

THE HON. STEPHEN JOHNSON FIELD,

Associate Justice of the Supreme Court of the United States,

THIS BOOK IS DEDICATED

**IN RECOGNITION OF HIS GREAT WORK IN THE DEVELOPMENT AND
INTERPRETATION OF THE MINERAL LAND LAW**

PREFACE.

THE law of mines has no logical existence as a separate branch of jurisprudence, but it is a convenient phrase to comprehend those special rules of law which have been deduced by the application of general rules to the questions that arise as to the rights and duties of miners and mine owners in their relation to the land, to one another, and to those in contact with whom they are brought by reason of the business of extracting the various kinds of valuable minerals from the earth.

The aim of this book is to give a complete and accurate statement of these special rules of law, so stated and arranged as to furnish what the authors' experience has taught them to be the requirements of the active practitioner. The authors have refrained from giving their own ideas as to the rules that ought to be adopted, and from criticising the rules that the courts have laid down, except when those tribunals have been so opposed to one another as to make it necessary to express a choice between opposite positions. But they have constantly aimed to state clearly the law as it is to-day, and to furnish the reader with every authority and important dictum in support of the statements contained in the text.

The authors have attempted to make this work as comprehensive as possible, and have not confined themselves

to the law which is applicable only to any particular portion of the country, or to mines of any particular kind. The other American books with which they are familiar are confined to the statutory system under which title to mines is acquired and mining is conducted upon those lands which are or have been a part of the public domain. The present work aims to cover this field fully, and also to deal, with equal completeness, with the questions of title to mineral lands, mines and minerals in those States in which the common law on the subject of real estate ownership applies.

As the authors are impressed with the fact that a lawyer who undertakes to deal with the legal questions which are submitted to him by mine owners cannot be completely equipped for the task without a certain knowledge of the formation and mode of occurrence in nature of the various kinds of mineral deposits, the work is preceded by a chapter in which these subjects are explained briefly, but, it is hoped, accurately and fully, and under an arrangement which is based on the classification of the subject required by the law. The importance of this feature will be especially appreciated by those whose practice requires them to deal with mining properties situated upon the public domain, because in the application of the United States statutes important legal distinctions are intimately connected with geological or physical differences.

D. M. BARRINGER.

JNO. STOKES ADAMS.

PHILADELPHIA, September, 1897.

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GEOLOGICAL PREFACE.

THE extended experience of one of the authors in the work of a mining engineer and geologist has convinced him that it is absolutely necessary to have a clear understanding of the differences between the various kinds of mineral deposits and their mode of occurrence in nature, and also to know something of their origin, in order to properly appreciate many of the legal questions which have arisen in connection with them. In fact, some important legal distinctions are founded entirely upon these physical, or more properly, geological differences.

Every lawyer who has a large practice in mining law should therefore have some knowledge of geology, and to such the author is glad to recommend the admirable works of Prof. Joseph Le Conte. By a careful study of these works he can get a better idea of American geology and of the fundamental principles of geology in general than from any other work with which the author is familiar.

The information contained in the following pages — a large portion of which is very generally recognized by those versed in geological science, but which is not at all well understood by those unfamiliar with such science — will be sufficient, however, it is hoped, to give a general idea of the subject, and enable the reader to have a clearer understanding of many of the physical and geological differences between the various kinds of mineral deposits, and therefore to better appreciate the reason for the legal distinctions which are based upon these differences.¹

¹ For the definition of the term "mineral" in a legal sense, see page lxxvi, under division "Natural Gas."

For a more complete description of the characteristics, the mode of occurrence

and uses of the minerals herein referred to, see a work by the author under the title of "A Description of Minerals of Commercial Value," published in 1897 by John Wiley & Sons, New York.

GENERAL GEOLOGY.

All rocks known to us are of two great classes, sedimentary and eruptive.

FIRST. **Sedimentary Rocks**, as implied by their name, are those which are of sedimentary origin. That is to say, they originated in accumulations, through the distributing agency of water, of (1) *either rounded or angular pebbles or sand* (minute quartz pebbles) of (2) *mud or finely divided clay*, and of (3) *calcareous silt* (coral mud) or *sometimes of minute shells*, at the bottom of seas, lakes, and rivers.

These three kinds of sediments, when consolidated, have made respectively pebble beds (conglomerates or breccia) or *sandstones*, *shale* or slate beds, and *limestones*.

By far the great majority of these, and always the first two, must have been derived from the ruin or breaking down of other rocks, either eruptive or stratified, or both, composing land areas, and it therefore appears that most of these rocks are of littoral or near shore origin. The first two, sandstone and shale, differ from each other only in the degree of fineness to which the detached fragments have been ground in the process of erosion, which will be referred to later.

Limestones, in many cases, have also had a somewhat similar origin. They have been formed by the degradation of great coral reefs and the subsequent pulverization of the detached fragments forming coral sand, or more frequently coral mud. It is thought by some that limestone beds have frequently been formed by the precipitation of carbonate of lime in the sea water. This theory of chemical origin may possibly be true in some cases, but the former physical theory of origin is regarded as more probable in the majority of cases. As might be inferred, many limestones have been formed from the erosion of pre-existing limestones, the fine granules being carried mechanically in suspension in water, and finally deposited as a sediment. Of course in the same way many beds of sand and of mud are derived from pre-existing sandstone and slate strata. Some limestone, chalk, and marble beds, however, are formed entirely from an accumulation (and subsequent consolidation) of myriads of small calcareous shells upon the sea bottom,—deep-sea ooze, for example; yet

all limestones are apt to contain various kinds of shells as they originally existed in a matrix of coral mud, in much the same way that shells on the sea floor, from very remote geological periods to the present, have become imprisoned in an accumulating bed of sand or of mud, which was brought to its present position through the agency of rivers or of ocean currents. With the exception of the so-called Primitive and Algonkian rocks (and in these they have probably been obliterated, owing to the fierce and numerous bakings which the rocks have received) nearly all sedimentary rocks contain evidence of many of the life forms existent in the ages when, as sediments, they were laid down. Of course these fossil remains are principally of marine origin, but the remains of many amphibian and land animals, and often of birds, have frequently been imprisoned in an accumulating bed of sand or mud, as, for example, in a lake, or in the alluvium of a river, or along a sea or lake beach. We are thus afforded an absolutely truthful but unfortunately very meagre record of the evolution of the various types of life forms from the earliest times.

Now and then a bed of volcanic ash consolidated into hard rock is met with, or beds of infusorial earth formed from an aggregation on a sea bottom or lake bottom of the silicious remains of microscopic life forms (diatoms); but as these are rare, and as the latter appear to have been principally formed only in late geological times, the three classes of sediments above mentioned, which when consolidated are referred to as sandstones, shales, and limestones, may be broadly considered as comprising all of the sedimentary rocks.¹

These sediments are nearly always commingled, and we have as a consequence sandy (arenaceous) shales and sandy limestones, shaly (argillaceous) sandstones and shaly limestones, calcareous sandstones and calcareous shales, sometimes referred to as marl beds. These names are applied to the strata formed by the deposits accordingly as the original sand, mud, or calcareous matter predominates. On the other hand, it is often remarkable how very distinct they are from each other, owing largely in all probability to the sorting effect of the water carrying the sediment,

¹ It should be mentioned in passing that diatoms have the faculty of abstracting the silica from the sea water in much the same way as the coral and other kinds of life forms have the faculty of abstracting the carbonate of lime out of which their shells are made.

and also to many unknown conditions surrounding their deposition. These sediments, as can be readily understood, were principally laid down at the mouths of rivers, or on the sea bottom near to the shore line. In the majority of cases it is certain that the deposition of the sediment proceeded with inconceivable slowness. In some cases, however, it is certain that these sediments were deposited far from the shore, as ocean currents would easily carry such finely divided sediments a long distance from the shore. The origin of some chalk beds is probably explained in this way.

After, and often before, being consolidated into hard rock (by pressure of superimposed sediments, and often by a cementing process due to the chemical action of some of the constituents of the deposited material, such as iron, lime, silica, etc., or by heat) these sediments have been raised and have become land areas. When consolidated, these form the ordinary stratified rocks with which all are familiar, and which form the greater part of the surface of the earth exposed to our examination. They are often found aggregating many thousands of feet in thickness. An individual bed of any of the kinds mentioned in such a series of stratified rocks may vary from a few inches or even a fraction of an inch to hundreds and, in rare cases, several thousands of feet in thickness. They, however, usually alternate constantly, owing to the differing conditions which produced them.

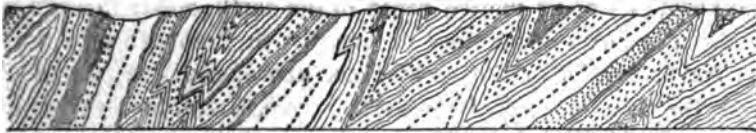


Familiar sections of Stratified Rocks (Geikie).¹

In some cases, and especially when they are of great geological age, these beds or strata have been heated or baked and compressed to such an extent that they have lost their original character of sandstone, shale, and limestone, and have become respectively quartzites, slate, and marble beds. This metamor-

¹ Many of the diagrams contained in this Preface are taken from well-known treatises on geological subjects. Others are from sketches by the author. All are purposely made very simple in character, and are intended to render more clear the subjects discussed in the text.

phism has often proceeded further, and has absolutely altered the character of these rocks, so that the original compact sandstone or shale has been converted into a rock totally different from its original character or that of the rocks which we know by these names. Such rocks, in a general way, are known as metamorphic or crystalline rocks. Among such as were originally in the condition of mud or sand, and subsequently, through consolidation, shale beds and sandstones, by further metamorphism we find many in the present form of slates, quartzites, gneisses, and gneissoid rocks in general, micaceous, talcose, and other schists, some so-called porphyries, some kinds of granite, etc. It is important to remember this fact, because many valuable ore deposits are found in the very old rocks of this description. They are usually, and sometimes rather loosely, referred to as Primitive Rocks, Archæan and Algonkian Rocks, Crystalline Rocks, Metamorphic Rocks, etc.¹



Highly folded and crystalline Primitive Rocks (Logan).



Unconformity or later Sediments deposited on Eroded Surfaces of Upturned Strata (Le Conte).



Upturned and Eroded Strata in Colorado (Hayden).

¹ It must not be thought from this necessarily of sedimentary origin, for it is that all gneissoid and similar rocks are extremely probable that many of them

The third sedimentary rock (limestone) cannot be metamorphosed, generally speaking, further than marble, which is geologically termed crystalline limestone. Rarely, however, it has been converted into the rock known as serpentine.¹ Limestone, whether uncrystalline or crystalline,—in this country, however, usually when in the former condition,—is a most important repository of many valuable metallic ores, its calcareous nature having, in some way not always thoroughly understood, exerted a very favorable influence upon the deposition of mineral matter, especially of *certain* kinds. Much of this mineral matter, as will be seen in the latter part of this geological preface, was probably contained in hot waters which have come up through or in juxtaposition to the limestone strata.

SECOND. The second great class of rocks are those which are known as **Eruptive Rocks**, and which have all, at one time or another, been in a molten (semi-fluid or fluid) condition. The material from which these rocks have been formed came up from unknown depths or melted areas in the earth, either through the vents of volcanoes or more frequently through great or small cracks or breaks in the rocky crust above, and was poured out over the then surface of the earth. Sometimes, however, it has not reached the surface, but after coming up a certain distance was unable to ascend further, and subsequently slowly solidified far beneath the surface. In one form or another these rocks probably form a large portion of the earth's interior, and underlie all stratified rocks, but at varying depths. It is not at all certain that they form the central mass of the earth, and they are by some supposed to occupy, generally speaking, a position between the outer crust and the interior central mass, whatever the nature of the latter may be.

These eruptive rocks are of many kinds, owing to their different chemical composition. These are, in a general way, all of the granites (except some of the metamorphic granites above referred to), syenites, and porphyries, as well as the rocks which

are very ancient and greatly metamorphosed eruptives. The schistose structure of many of these rocks has probably been given to them by subsequent heating and great pressure. The researches of the Canadian Geological Survey have thrown much light upon the probable origin of

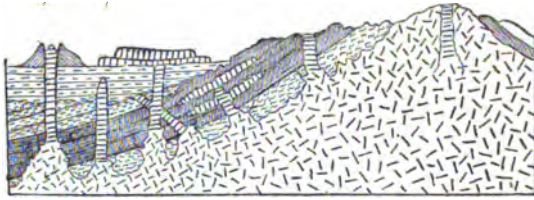
many of these very old rocks, and some of the best Canadian geologists are disposed to doubt the original sedimentary character of many schists and kindred rocks.

¹ Most serpentines, however, are changed eruptive rocks known as peridotites.

are known as diorite, trap, diabase, basalt, phonolite, rhyolite, trachyte, andesite, gabbro, obsidian, pumice, etc.

In mining, one usually meets with these rocks either as lava flows, when they form great beds often extending over large and usually very irregular areas, or as dikes which have welled up from below through crevices or cracks in the pre-existing and overlying rocks. These pre-existing rocks may have been either sedimentary or eruptive. This is merely a matter of accident, according to the character of the rocks at the localities where the volcanic agencies to which the eruptives owe their origin have been acting. Thus we often find that dikes of trap or some other eruptive rock have come up through coal measures, and through the coal beds themselves. Often ore deposits, which in many cases had been formed before the injection of the molten material, are found to be cut in two by a so-called dike. At other times these eruptive rocks have come up in immense masses, pushing aside the strata above or extending their liquid tongues far out between the stratified rocks, usually along the lines of stratification or at a very small angle with them. They often appear to be stratified when this has occurred, and especially is this true when they have been poured out over the bed of the sea in which sediments were being deposited and afterward covered with sedimentary material. Sometimes we meet with a bed or flow of lava containing innumerable angular fragments of eruptive rocks cemented together by the lava. Some of these were very probably thrown out of an old crater, and in falling became embraced in the lava flow; or more often these angular pieces simply represent the unfused portions of the igneous rock of which the lava represents the fused portion, the two having been brought up together through the volcanic vent. It sometimes happens that angular rubble has been picked up by a lava flow. These rocks are called volcanic breccia.

These eruptive rocks, especially when in the form of dikes, should be studied *very carefully*, because of the important part which they have played in the origin of deposits of the valuable metals or of their ores; for in the great majority of cases where deposits of these metals are found, eruptive rocks of one character or another are apt to be found traversing the neighboring country rock and often in the immediate vicinity, although the converse of this proposition is far from being true. It can be proven in a great

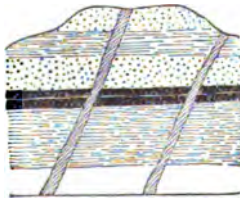
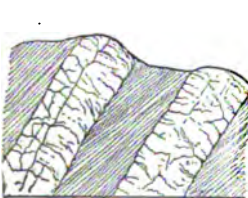


Mode of Occurrence of Igneous Rocks (Le Conte).

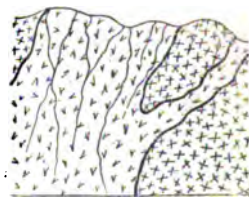


Dikes of one kind of Eruptive Rock cutting through mountain mass of another kind of Eruptive Rock (Geikie).

many cases, not only that the region which became mineralized was very hot during this process, but that the dikes or eruptive rocks came up at approximately the same time that the ore deposits were formed. The intimate connection between the two is thus established. The formation of the dikes is usually supposed and is often known to have preceded the mineralization; that is, the material from which they are formed was in the majority of cases injected before the latter process was begun. These dikes vary from a foot or less in thickness to thousands of feet, and may be traced across the country only a short distance or for many miles. Sometimes mountain masses are made up of dikes of one sort or another, or several kinds in juxtaposition or intersecting each other. Those which are commonly recognized as dikes, however, are usually not very thick, being from one up to somewhat over one hundred feet.



Examples of Dikes great and small.



Example of Volcanic Neck of large area.

Eruptive rocks can usually be distinguished with great ease, not only from the position they occupy and the absence of the lines of sedimentation, but also by their general appearance, from any of the three stratified or sedimentary rocks above referred to; namely, sandstones, shales, and limestones. Sometimes, however, as in the case of some of the metamorphic rocks of both classes, it becomes difficult to do this. In such a case it is necessary to send a specimen of the rock to some accredited petrographer so that he may examine a section of it under the microscope. In this way its original character can usually be determined without difficulty.

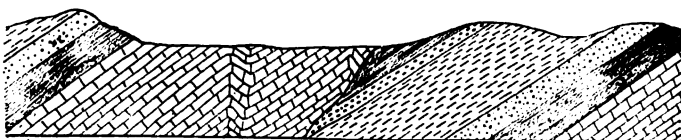
Rock Folding and Faulting.—It must be remembered that all these rocks, both sedimentary and eruptive, are frequently found to occupy positions now which are quite different from those originally occupied by them. Thus, consolidated sediments of thousands of feet in thickness may have lain for perhaps millions of years undisturbed in a nearly horizontal position, when, owing probably to the slow cooling and consequent irregular contraction of the interior of the earth, the so-called crust is thrust upon itself with an inconceivable force. By means of this pressure applied horizontally, or approximately so, nearly level strata are bent and twisted along certain lines of weakness in every conceivable manner, though they may have been the very hardest kind of rock. Of course all rocks, sedimentary and eruptive, composing the so-called crust are involved in this folding or crushing, but it is more easily discerned in the case of the former than in the latter. Volcanic action sometimes produces somewhat similar results; but when it has been the cause of the tilting of rocks, the disturbance has usually been regional, and very great areas have not been involved, as has been the case where the former agency has been operative.



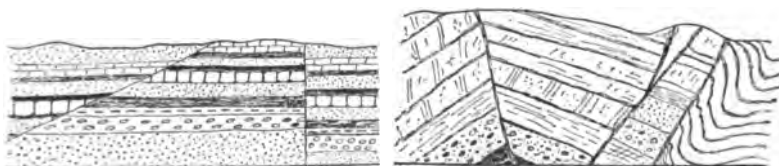
Section of Appalachian Range showing folded strata (Rogers).

Accompanying this folding or crumpling, but sometimes without it, as in the case of certain earth tremors produced by volcanic agencies, cracks or fissures have been established which reach to unfathomable depths, and the whole mass of rock on one side of

these cracks is often found to have moved up or down, bringing strata of different ages or different rocks, or different portions of the same rock, opposite each other. These slips or displacements vary from a few inches or less to many thousands of feet, and are common in all areas where there has been much folding or other evidence of regional disturbance, volcanic or otherwise. This establishment of cracks when there has been such a slipping is known as *faulting*, and these faults must be studied most carefully in connection with ore deposits. They are, of course, just as abundant in eruptive as in stratified rocks. So-called dikes of eruptive material have often come up through them, having found in such fissures a convenient avenue of escape. Moreover, it is largely through the agency of crevices formed in some such way that the majority of the deposits of mineral matter, which we know as ore deposits, have had their origin, for the simple reason that were it not for these fissures or deep-reaching cracks the hot waters, or perhaps in some instances vapors, which have produced many valuable deposits of ore, could never have come up with their load of mineral matter from the source from which they obtained it. The original sources of the elementary substances, which, when subsequently deposited, usually combined with one or more other elements, form many of our metalliferous deposits, will be perhaps forever unknown; for we will probably never be able to know sufficient concerning the interior composition of the earth at such depths below the surface as those



Fault in Southwest Virginia (Lesley).



Inclined and Vertical Faults.

A group of Faults (Geikie).

from which many of them have certainly been derived. Later faults, long after the deposition of the mineral matter had ceased, have often cut these ore deposits in two, and in some cases they cause the miner a great deal of trouble.

Soil.— Soil is usually the result of the gradual decay of the superficial portion of the solid or consolidated rocks beneath, and which are said to be *in place*; that is, through the physical and chemical agencies of rain, frost, or other atmospheric action the superficial portion of the rocks has gradually become rotten and has slowly dissolved into soil. A great portion of the soil of the world is of this description, and we observe here, simply, the first step in the grand work of erosion, since solid rock must first be disintegrated by chemical or physical forces, or by both, before it can be removed by the rainfalls which carry off this material to the rivers and so down to the sea.

In some cases, however, soil is alluvial; that is, it is composed of material (usually mud with some vegetable matter, and often including pebbles and sand) which has been brought from some locality more or less distant from that now occupied by it through the action of water. Many old river and lake bottoms furnish soil of this description. Somewhat similar in origin is the kind of soil which is produced by the recent raising from underneath the sea, of unconsolidated marine sediments. Thus the upper portions of many late Tertiary and Quaternary strata now covering land areas have become what we know as soil. For example, there is much soil of this description in the southern portion of the United States. But, generally speaking, most of the soil of this country, as of the rest of the world, is produced by the exceedingly slow rotting of the upper portion of the *solid* rocks, stratified or eruptive, immediately underneath.¹ It is thus easy to see that the value of land for agricultural as well as for mining purposes must always depend upon the geological conditions which may be found to exist over any given area. For example, limestone and some eruptive rocks, when they are superficially converted into soil, often make excellent farming land, while sandstone and other classes of eruptives usually make poor land, etc.

Erosion.— Another very essential point — and especially essential in the study of mineral deposits — to which it is desired to call

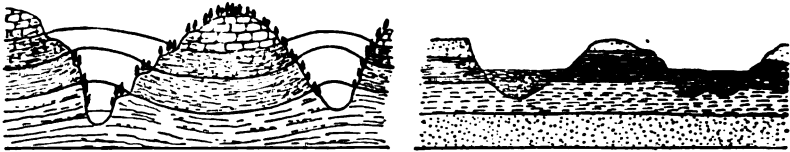
¹ In glaciated regions we often find and even soil have been shifted by the ice that large quantities of boulders, pebbles, sheet.

attention is that one cannot overestimate the importance of the process which is known geologically as erosion, and which has operated everywhere on land areas since the earth cooled sufficiently to permit of oceans. Even those who have given much study to geological phenomena often fail to appreciate properly the huge mass of material which has been removed by the various agencies of erosion. These agencies are rain and the chemical atmospheric action mentioned, rivulets and rivers, the ever-acting agency of the sea beating upon a coast, glacial or ice action, etc. Glacial action, however, has not been nearly so important a factor as the others. All stratified rocks, often of many thousands of feet in thickness, have certainly been formed from the ruin or disintegration of previously existing rocks composing land areas which have been mainly eaten away by the sea, or by the action of rain falling upon, and of the rivers traversing, these areas. Even when throwing out of consideration the immense thickness of the older stratified rocks, which of course owe their origin to the erosion of ancient and unknown land areas, it is at present possible to prove that upon many portions of the earth exposed to our examination several miles in thickness, or rather in height, of solid rock have been removed from the surface of a given area. At any place whatever it is impossible to form a correct idea of the huge amount of material which has certainly been worn away, carried off, and deposited somewhere else. Erosion can be observed and studied to best advantage in the case of stratified rocks, but we know nothing of the amount removed from the older rocks, sedimentary or eruptive, upon which, as the floor of some ancient sea, these sediments were laid. So on it goes, and probably will for countless ages, in what appears to be an endless cycle, always a tearing down and rebuilding, a never-ceasing conflict between the forces which elevate continents, and the rainfalls which endeavor to reduce these to the common level of the sea. This is one of the reasons that we so often find nothing remaining of the outpouring of eruptive material, but only find the neck of an old crater or else the so-called dike, which occupies the vent or rift through which this rock came up when in a molten condition. The famous Palisades of the Hudson are an example of the latter. Practically all mountains, no matter how high, and other topographical scenery are due simply to the irregular action of erosion which has carved out valleys, often, though not always,

indicating softer rock, and left standing the hills or mountain ridges, which frequently mark the position of harder or more unyielding rock. But from above the tops of these very hills or great mountains themselves there is good reason to believe, and in fact we frequently know, that thousands of feet of rocky material have been removed by exactly the same agencies. Whole series of strata of great thickness have often been slowly bent and fearfully crumpled, and thus elevated over vast areas, and then afterwards greatly eroded, giving rise to effects that could not be easily understood were it not for the appreciation of the grand results accomplished by the denuding agencies mentioned above. This is going on at the present time, but with inconceivable slowness, yet perhaps quite as rapidly as it has during different portions of the past many millions of years. Of course the denuding and rebuilding agencies have operated somewhat more rapidly at certain times than at others, as in times when there was a great amount of precipitation, but, so far as is known, always with exceeding slowness. And yet we know that twenty or thirty thousands of feet of sediment, or even more, covering hundreds of thousands of square miles, were accumulated during a single geological age!

It is the appreciation of these things which gives one a slight inkling of the absolutely inconceivable vastness of geological time. It also makes any attempt to compute this time most difficult; for, so far as we now know, we have no data of a definite character to reason upon. In the author's opinion, any calculations based upon thickness of strata and other such data must of necessity be very unsatisfactory, because we know nothing whatever of the conditions — amount of precipitation, etc. — which prevailed at the time these strata were laid down as sediments. All we know is that "time is long," geologically considered, — so long, indeed, that the human mind cannot compass its vastness. The history of the world as recorded in its stratified rocks contains irrefutable evidence of an age equal to many millions of years, beyond which, however, lies that which Professor Le Conte aptly calls the "infinite abyss of the unrecorded."¹

¹ Lord Kelvin has recently given it as his opinion that the earth solidified between twenty and thirty millions of years ago. In the present stage of our knowledge, however, it is submitted that these figures may be very far from the truth; such a distinguished authority to the contrary notwithstanding.



Sections between River Valleys showing Erosion (Phillips).



Ideal Section north and south from Canada to Pennsylvania (Le Conte).



Anticlinal Fold.

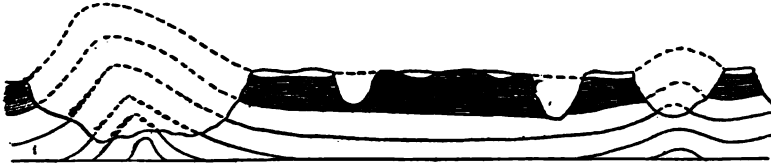


Synclinal Fold.

In the diagrams it will be observed that where the strata have been subjected to enormous pressure applied horizontally, and producing the folding already described, valleys have often been carved out of anticlinal rather than synclinal folds.¹ This is due simply to the fact that wherever a start has been made in the top of such a fold, — sometimes through the original and constant assistance of some crack, which is very often a fault, — rain or snow water running either way *down* the lines of stratification or of sedimentation has been able, though with infinite slowness, to carve out a great valley — frequently a number of

¹ Anticlinal folds are those where the strata present to the eye a convex appearance, whereas in synclinal folds they present a concave appearance.

miles wide and several thousand feet deep — much more readily than in the case of a synclinal fold. This is the simple explana-



Section across Cumberland Plateau and Lookout Mountain, Tenn. (Le Conte).



Fissure Spring and Artesian Well (Le Conte).

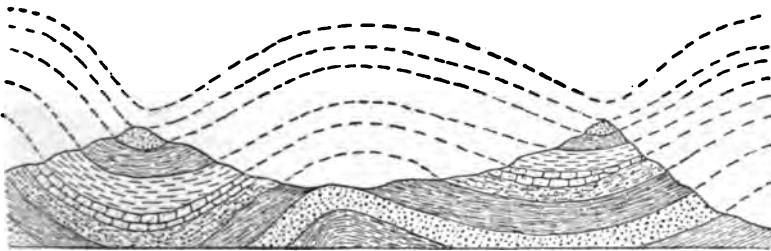


Diagram showing gently folded Strata and Amount carried away by Erosion.

tion of what otherwise appears to be a rather curious phenomenon, and one which is constantly observed in nearly all regions occupied by gently folded strata.

KINDS OF MINERAL DEPOSITS.

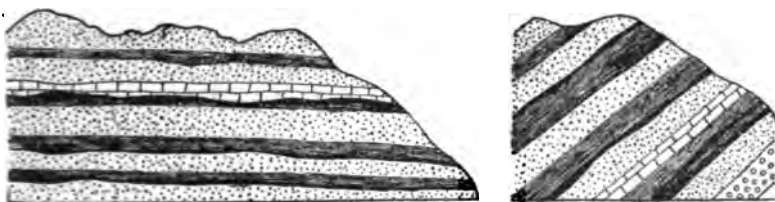
I.

STRATIFIED MINERAL DEPOSITS.

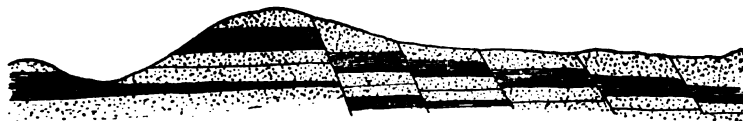
(a.) *Non-metallic Minerals.*

Coal. — This is the simplest of all mineral deposits. Unlike most of the others, it is of sedimentary origin, and therefore it is clear that it must be distinctly stratified, and, moreover, that it cannot be found except in association with stratified rocks, usually strata of sandstone and shale. It is supposed that coal was derived originally from accumulations of decaying wood or other vegetable matter forming what are generally supposed to have been peat bogs or swamps. It is supposed that most of the beds of coal were formed at the mouths of rivers as they emptied into some gulf or brackish arm of the sea, because the fossils in the enclosing rocks are not those which are usually found in salt-water sediments. It is probable that they were formed usually at a place where the water was shallow, and where the areas covered by these peat bogs or original forest swamps were undergoing a gradual subsidence; but after being submerged, owing to the more rapid accumulation of sediments of sand or of mud, these areas were reclaimed and again appeared above the surface of the water, when luxuriant vegetation is supposed to have again sprung up. This explanation is not in all cases absolutely satisfactory, except as to the gradual subsidence of the land and the contemporaneous and more rapid deposition of sediments. It has therefore been suggested that in the case of some seams of coal, a portion, if not all, of the vegetable matter from which the coal has subsequently been formed — ferns and other vegetable life of that day — was originally washed or drifted from some other locality than that where it was deposited and now lies. In other words, that in the case of some coal beds where it cannot be proven that the vegetable matter grew and rotted *in situ*, it was deposited in its present position somewhat after the manner of the other sediments which accompany these deposits, that is to say, partially, if not in some cases wholly, through the assistance of moving water. While this is certainly not wholly true with regard to a large proportion of coal deposits, there may be much truth in the theory.

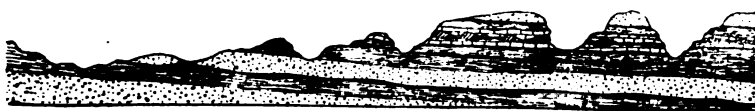
Limbs of trees many feet long, now converted into coal, are sometimes found lying horizontally in a coal bed which is not more than four or five feet in thickness, and yet nothing whatever can be found of the trunk or roots of the tree of which this limb formed a part, either in the coal itself or in the underlying or overlying strata. In fact, the line of demarcation between the coal bed and the sandstone or slate (rarely limestone), which overlies or underlies the coal bed, is frequently very abrupt. This phenomenon and that of the thin parting of slate (original mud), which has no roots whatever penetrating it, and which is so often found in a seam of coal, and is often almost as extensive as the coal bed itself, is more easily accounted for on this theory than on that of an original peat swamp. Again, while roots of trees are found in the case of some coal beds, as for example in England and in Nova Scotia, their absence in the underlying sediments, as already implied, is significant of an origin somewhat different from that which is generally attributed to coal beds, and which supposes the vegetable matter to have grown and rotted in the place now occupied by it transformed into coal. In many cases, however, the latter theory of coal accumulations can be proved to be the correct one. It has been suggested that there



Level and Upturned Strata containing Beds of Coal.



Step Faults in Coal Measures (Geikie).



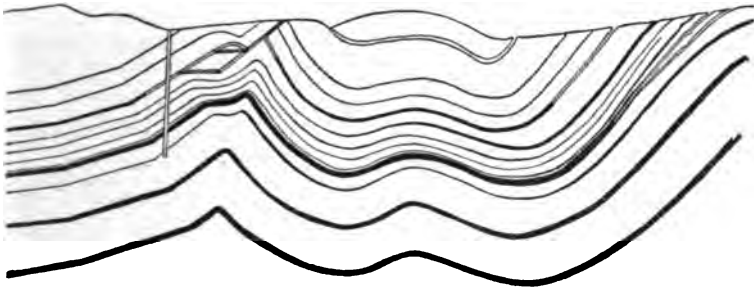
Section of Coal Field in Ohio showing also an Interstratified Bed of Iron Ore.

may be truth in both theories, and that both agencies may have contributed to the formation of what we now know as a bed of coal. There is much to recommend this view.

It is quite certain, however, that the land area and, of course, the sea bottom, or sea floor, as it is commonly called, during these coal-making periods were undergoing a gradual subsidence, and in this way the fact of the existence of a great number of coal beds, — sometimes thirty to forty, — one above the other, or younger than the other, with intervening strata of sand or of mud sediments, with an occasional bed of limestone, is explained. Some of these original deposits of vegetable matter or coal marshes, whatever their nature may have been, were evidently of great extent, as is shown by the wonderful continuity and immense area, covering often hundreds and thousands of square miles, of some of the coal seams of the present day. Perhaps as the land underwent a gradual subsidence the coal marsh as gradually crept landward. Other seams are of very limited extent and very irregular in shape, probably conforming, as is thought, to the shape of the original peat marsh or swamp from which the present coal is supposed to have been derived. Or, as suggested above, it is possible in some instances that the irregular contour of the area occupied by present coal beds may be partly due to the irregularity in deposition of the original *drifted* accumulations of vegetable matter. In this general way we account for the fact that very frequently a coal bed, like a bed of sandstone or of shale, will get thinner and thinner until it ceases to exist; but a short distance further on a bed of coal will be met with in the same geological position; that is, between the same underlying and overlying rocks, — for example, between the same slate (shale) and sandstone strata. As is well known, a bed of coal is apt to be thicker at one place than at another, but we are not concerned immediately with these vagaries of coal deposits. It is sufficient for our purpose to remember that they are distinctly stratified and interbedded layers, extensive over very considerable areas, and varying from a few inches, or a mere band, to sometimes twenty or thirty feet in thickness, or rarely considerably more.

The diagrams will give an idea of typical coal deposits, and will also show how portions of a coal seam and of the accompanying strata have often been carried away by erosion. Some of them will also show how these sedimentary rocks have been folded,

and are not now lying in their original horizontal position. Of course the coal, *being held within sedimentary rocks*, must conform to all the twists and turns observed in the latter. An excellent example of folding of sedimentary strata can be observed in the anthracite region of Pennsylvania, and for this reason a diagram illustrative of a section of a portion of this region is inserted.



Anthracite Coal Beds in Folded Strata, Schuylkill Co., Pennsylvania
(Ency. Brit.).

Kinds of Coal. — It is enough for our purpose to know that the various classes or kinds of coal, commercially considered, are determined principally by the amount of volatile matter which they contain, and that there is less and less of this according to the degree of heat and pressure to which they have been subjected, or usually according to the age of the deposit.

Coal varies from rotting vegetation or, by further alteration, peat, at one end of the series, to graphite, or so-called "black lead," at the other end of the series, according to the degree of metamorphism to which it has been subjected. This is often determined by the age of the coal, but not always, as local influences, such as slow heat, like that produced by unusual compression, or more rarely heat from volcanic sources, may have assisted in altering the character of the coal. The original chemical composition of the coal itself may possibly have contributed somewhat to this result. Generally speaking, however, the oldest coal has been subjected to the greatest amount of change, and the youngest to the least amount. We have coal varying from peat to peaty lignite, or brown coal (always of very modern origin), then to true or black lignite. From the latter we find the lignite grading into bituminous coal, until we reach the true bituminous coal. From the bituminous we find it grading

into anthracite. The anthracites themselves vary greatly in their composition and in the amount of volatile matter which remains in the coal. As more and more of this volatile matter is driven off we find, as in the other grades, even the anthracite gradually becoming more and more graphitic in character, — like the coal of Rhode Island, for example, — until we finally arrive at pure graphite. The latter is usually found only in the oldest known sedimentary rocks.

Of course coals vary greatly one from the other in the matter of purity. Some of them contain little or nothing outside of that contained by the original vegetable matter, to the decomposition of which they owe their origin. On the other hand, some are found containing great quantities of sand and mud, which were washed into or over the peat swamps forming, as is usually thought and has been pointed out, near the mouth of some broad river emptying into an arm of the sea. This sand or mud has of course remained in the coal ever since. Iron and sulphur are frequently found in coal, forming, when combined, iron pyrites, and affecting its value greatly. The lawyer, however, is concerned more with the geological or physical peculiarities of such a deposit; that is to say, its mode of occurrence, its general form, and its extent. As has already been stated, a single bed — especially when the strata are horizontal or nearly so — is often extensive over a very large area, many square miles in extent. It is found close to the surface or at very great depths below it, according to the present topographical conditions of the country, — that is, according to the amount and extent of erosion, — or according to the position of the strata in which it is included, or very often according to what is called the dip or inclination of the same. This can be readily understood by reference to the diagrams. In this connection the effect of erosion, which has carried away large areas of coal beds, along with portions of the strata which contain them, is also to be noted. As already stated, beds of coal vary in thickness from a few inches or a mere band to a number of feet, but the seams which are usually worked in this country vary from three feet or a little less to eleven or twelve feet. Sometimes, however, they greatly exceed this thickness. A coal bed does not always maintain its thickness, but is frequently found to be much thinner at some places than at others. In this respect, nevertheless, it furnishes a great exception to

most other mineral deposits, as it is much more regular and more nearly maintains its thickness than any other class of deposits.

It is to be noted in this connection that a deposit of coal is properly referred to as a coal *bed* or coal *seam*, and not a coal vein. As will be seen hereafter, a *vein* usually presupposes an original break or rift — often an old fault — in the rocks, through which crack, mineralized waters have subsequently made their ascent. An accumulation of peaty material, however, being more or less a sedimentary deposit, is properly referred to as a bed, in the way we speak of a bed of sandstone, or bed of shale, or bed of limestone. Indeed we often have coaly (carbonaceous or bituminous) shales, or “black slate,” as it is commonly called by the miners, containing, we will say, five per cent combustible matter and ninety-five per cent ash, which means simply that a little peaty or vegetable matter got mixed with the mud at the time the latter was deposited.

Asphalt. — This is a curious mineral, the origin of which is not at all well understood. It is supposed, however, that it is derived from certain kinds of organic matter in salt water, — not fresh or brackish water, like coal, — whether vegetable or animal, or both, it makes little difference. It is a significant fact that it is always found in connection with sedimentary fossiliferous rocks, — from Palæozoic up to Tertiary, — and it is this which gives rise to the supposition that it has its origin in some kind of marine life, the structure of which may have been such as to leave no other evidence of its existence. It is a black tarry substance, with the peculiar odor of bitumen. Asphalt sometimes is found forming great pools or lakes, which in some cases have probably exuded from the inferior or adjoining rocks. An example of a deposit of this kind is the famous pitch lake on the island of Trinidad. More frequently it is found impregnating or saturating certain rocks, but only those of sedimentary origin; that is, either limestones, sandstones, or shales. In some cases it is found impregnating a portion of a coal bed, and the so-called cannel coal is supposed by some to owe its extremely bituminous nature to an admixture with the coal seams of the organic material from which asphalt has been produced.

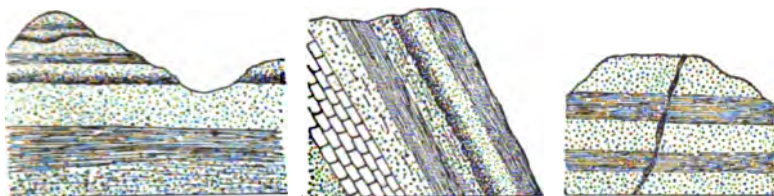
In Kentucky, Indian Territory, Utah, and California there are quite thick strata which are in places heavily impregnated with

this asphalt or bitumen. In some of these areas, where there are crevices or cracks in the rock, these crevices are filled with this bituminous substance or asphalt (Utah and California). According to the amount of oxygenation which this substance has undergone in these cracks it has given rise to many different but kindred minerals, the principal among which are *albertite* (Nova Scotia), *grahamite* (West Virginia), *gilsonite* and *ozokerite* (Utah).

Asphalt itself seems to be the residue of the distillation of the more volatile oils, or it may be that these oils have by some metamorphic agencies (heat, pressure, etc.) been converted into it. It is very variable in composition, and is usually mixed with extraneous material. With the exception of the lake of Trinidad mentioned, and some deposits in Venezuela,—where it is found in a very pure condition relatively speaking, and is dipped up, put into barrels, and shipped away in the crude state,—it is usually mined in connection with the rock which contains it, and it is used for paving material in this condition. This crude material, however, is usually refined. Very rarely it is found forming what seems to be a coal bed, so absolutely stratified is it, and so comparatively free from impurities. This occurrence is, however, rare, and when seen, such a deposit is usually found to become, in a short distance, more and more admixed with the material forming the adjacent rocks.

With regard to its mode of occurrence, therefore, it is only necessary to remember that it is usually found impregnating, saturating, or admixed with the material which forms some sedimentary stratum, and is never found in eruptive rocks, in which respect it is like coal, though differing from it widely in others. In Kentucky, Indian Territory, Utah, and California these strata are sandstones, while the chief asphalt deposits in Europe are in limestone. The veins or crevices in which the kindred minerals (*gilsonite*, etc.) above mentioned are found in Utah, California, West Virginia, and Nova Scotia would probably be classed in a legal sense, as they would certainly be in a geological sense, as true fissure veins, although they do not contain any *metallic* minerals. As those upon government lands are principally found upon land which is now included in Indian Reservations, the question as to their legal classification has not yet arisen; but upon the lines of reasoning followed by our courts with regard to recog-

nizing the geological or physical differences between the various classes of valuable mineral deposits, and basing important legal distinctions upon these, rather than upon the chemical or mineralogical differences of the substances contained in the deposit, it is suggested that since these minerals are found filling true fissures, the deposit would properly be located as a "lode," and what is known as the law of the apex would rule.¹



Mode of Occurrence of Interstratified Deposits of Asphalt.

Petroleum. — Petroleum, or mineral oil, is as much a mineral in a legal sense as though it were of a metallic nature. Its origin is quite certainly more or less similar to that of asphalt, and probably it and its kindred substances represent the more volatile oils, which either have been distilled off of the original deposit of bituminous material contained in shales, limestones, and sandstones, leaving the heavier material (asphaltum) behind, or which, when subjected to metamorphic influences, were converted into it. It is often found in or *above* rocks which contain the deposits of asphalt; that is to say, the two belong to the same series of strata, or approximately so. In fact, it is supposed by some that many of the deposits of asphaltic sandstone and limestone, or other rocks with which this substance is admixed, simply represent what is left of the original material, whatever it may have been, after vast quantities of petroleum and the more volatile oils and gases have escaped. Others contend that these asphalt deposits simply represent in themselves old oil *pools* converted into asphalt by being exposed to the atmosphere or other oxygenating influences.

If the former theory is the correct one, as is probable, these asphaltic deposits, if they are now in the condition of asphalt, are

¹ In the writer's opinion this view does not conflict with the opinion of Secretary Teller, 1 L. D. 561.

to be found perhaps several thousand feet below the present surface, that is, considerably below the present oil-bearing strata; and the more volatile substances (petroleum and natural gas), owing to the heat produced by the blanketing effect of the superimposed sediments, or for any other reason, have escaped from this, their original source of bituminous material, and ascended until their further progress was checked by some impervious stratum. This is usually some bed of clay or slate (shale), or what has produced the same effect, the so-called "shell" of closely cemented grit or other dense impervious material. In this way the oil and the gas which accompanies it have usually collected, and often in great quantities, in the open-textured or porous sandstones and grits beneath this stratum, but are not found in the other rocks of the series which are more dense. The latter are principally shales and fine-grained sandstones. It is, however, found in great quantities in limestone beds, but only where the surrounding conditions have made this a suitable repository. In this connection it should be remarked that oil, like water, is found only in rocks which are porous or contain fissures and cavities, great or small, *i. e.* sandstones or limestones. Conversely, the rocks which, like shales, are not water-bearing in a general sense are not oil-bearing.

It must not be supposed that the oil generally occupies great or small subterranean cavities, although possibly it may rarely be found doing so, as in limestone. It usually occurs in nature as simply occupying the spaces or interstices or so-called pores between little pebbles and grains of sand in some rather open-textured but not necessarily incompact rock, or now and then is collected in the fissures and cavities of such rocks. Its source is quite certainly below the point at which it is at present found, because it will usually ascend and escape through any outlet it may find, owing to the elasticity of the accompanying gas. When there is a gentle roll or anticlinal fold or "saddle" in the strata, oil and gas are often found occupying, though very irregularly, positions in the crest of this fold underneath the impervious stratum. It does not seem to be found in large quantities in strongly folded strata, owing to the fact that the metamorphic agencies which caused the folding and tilting of the rocks have either converted the lighter oils into the more solid asphalt, or, as is more likely, the upturned and eroded strata have afforded these light

oils a good opportunity to escape. When the rocks, however, are lying level it is impossible to tell where it will be found, except to say generally that if found at all it is likely to be met with in certain oil-bearing strata. The random drilling of exploratory holes is the only way to test such a region. The depths at which it is found in this country usually vary from five or six hundred feet to very often upward of three thousand feet. The sinking of a new oil well in a so-called "pool" often interferes with the production of a previously existing well in close proximity to it. These so-called pools in the oil-bearing sandstones or so-called "sands" are simply localized areas of oil-bearing territory in certain and, by experience, well-recognized strata, usually sandstones or grits, as in Pennsylvania and California. They may be found, however, in the fossiliferous strata of any age, from Silurian (in Ohio) to Devonian, Sub-carboniferous and Carboniferous in Canada, Pennsylvania, West Virginia, etc.; Tertiary in Russia. It is sometimes found in limestone, which in Ohio has been the chief oil-producing rock. These pools are most irregular and indefinite in shape, no two being alike. When broadly considered, they are often found to have a certain trend or definite direction across the territory in which they are found, involving in some cases a number of States. Accompanying oil and natural gas, and in the same rocks in which they are contained, large quantities of salt water are frequently found. It is not necessary here to go into further geological explanation of these facts.¹

Natural Gas. — As intimated in the preceding description of oil deposits, natural gas is only another product of the same substance which has produced both asphalt and petroleum, whatever that substance or source may have been. It simply represents the *most* volatile portions of such substances, — the heavier having been converted, as is supposed, into bitumen, — which volatile portions have been driven off by the agencies above referred to. It is always found on top of the oil when immediately associated with it, but sometimes it is found isolated and far beneath the oil-producing strata in the vicinity. This is simply due to the fact that it was checked at this point in its upward course and collected there. Give it a chance, and it will always rise

¹ By act of Congress, February 11, 1897, petroleum lands must be located as *placer claims*.

above the oil, being more volatile. While not a mineral in a mineralogical sense, it is so considered in law. For in a general legal sense *any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil, is a mineral.* With a number of exceptions—such as coal, graphite, limestone, infusorial earth, asphalt, petroleum and natural gas, phosphate rock, guano, nitrate of soda, amber (fossil resin), etc.—these substances are of inorganic origin. The above definition is of course not a definition of the term as used in geology or mineralogy, but only as used in law and in commerce.

Sulphur. — This is a non-metallic mineral which has great commercial importance. Its principal occurrence in nature is either in the form of native sulphur or of a mineral known as iron pyrites; that is, a combination of sulphur and iron.

Native sulphur is found in large quantities in the neighborhood of extinct volcanoes or in craters of the volcanoes themselves, such as in the crater of Popocatepetl, etc. There are many deposits of it in the Andes, and in Mexico and in Sicily; but it is also found in this country, as, for example, in Nevada, Utah, Yellowstone Park, and elsewhere, but always in very irregular superficial deposits. It is nearly always impure, that is, admixed with extraneous matter.

Iron pyrites, however, is a very different substance, and is a glistening yellowish mineral, which has been formed in the great majority of cases from the contemporaneous deposition and union of sulphur and iron solutions in presumably ascending hot alkaline waters or possibly vapors. This has been deposited in vast quantities in rifts or breaks in the rocky crust, and in other places in it suitable for the deposition of such mineral solutions. It is very often found in pockets or seams in limestones near eruptive rocks, or at the contact between these eruptive rocks and the limestone, or some other rock, through which the eruptive rock when in a molten condition came up. Pyrites is mined in great quantities in Spain, Portugal, Newfoundland, and in the United States, but, for matter of that, all over the world, principally, however, for the other metals which may be associated with it, such as gold, silver, copper, nickel, etc., and which will be considered hereafter. It is a most important mineral,

and of very common occurrence in nature. For these reasons it will be referred to again under its proper classification as one of the metallic minerals. It is referred to at this time only because large quantities of sulphuric acid are manufactured from it.

Phosphate Rock. — This is a very peculiar mineral, which is found in large quantities along the Atlantic border of the United States. Its chief use is in the manufacture of fertilizers. A mineral known as apatite, and which is largely composed of phosphate of lime, was formerly extensively mined in Canada, but owing to the discoveries in Florida of large deposits of so-called "high grade" phosphate rock it has ceased to be mined on a large scale.

The common variety of phosphate rock occurs in irregular superficial beds or as water-worn fragments or pebbles, the latter having very probably become detached from these irregular deposits, and sometimes carried great distances from their original source, by the action of the sea or rivers. Along with these phosphatic nodules or fragments there are found great numbers of fossil bones of many species, fossil teeth, etc., which have often been enriched by phosphate of lime, so that they now contain much more of this substance than originally.

The theory which probably contains most truth with regard to the origin of these deposits is that they are due to immense ancient deposits of guano, or other remains or accumulations, derived from various forms of animal life, and which contained large quantities of phosphate of lime; as, for example, guano and the bones of animals are known to do. These deposits, whatever may have been their exact nature, are known to have been of great magnitude in Tertiary times, owing to the very great abundance of animal and especially of bird life, the latter favoring the theory of guano as the chief factor in producing the present material. According to this theory, when guano accumulated on a coral reef or on an exposed portion of a bed of limestone, the slow action of rain water falling upon it, or other phosphatic material, caused some of the soluble phosphates to be carried down and to be redeposited in the limestone or marl beneath. That is to say, such slightly acidulated water would readily take into solution the carbonate of lime, forming by far the greater part of the limestone, and leave behind its previous

load of phosphate of lime. In this way the process of substitution, or what is known as pseudomorphism or *replacement*, has taken place. Original fossil shells (carbonate of lime) are often met with which have been accurately replaced by phosphate of lime, so that they now contain a large percentage of the latter. This can be proved to have taken place in a great many instances, and it is doubtless as good a solution of the problem of the origin of these deposits as any which has yet been offered.

It is readily seen that these deposits are apt to be very superficial, unless covered by later sediments, and very irregular in shape. Most of them which have been worked, as in Florida, are of comparatively recent origin in a geological sense (Tertiary). Deposits of somewhat similar material have, however, been recently found in Devonian strata in Tennessee.

That great quantities of pebbles of phosphate rock are found, as, for example, in the southern portion of Florida, is owing to the fact that they are very insoluble; and when once a fragment of this substance has been detached from its original source, it could be carried many miles by ocean currents or by rivers, but would lose little or nothing except by attrition, simply becoming water-worn like any other pebble which is with difficulty soluble, like those of quartz, which are often found with the phosphate pebbles. These phosphate pebbles have been distributed over considerable areas, and subsequently collected in the rivers which traverse these areas, having obeyed the laws which govern the distribution of any other pebbles. In fact, the author sees no reason why they should be regarded as differing materially from any other pebble in their mode of origin, except as above stated. It is possible that the very irregular shape of some of the so-called "nodules," such as those which are found in South Carolina, for example, can be explained by the irregularity of the superficial replacement of the original limestone rock or perhaps marl. When small fragments were subsequently detached from such a deposit, the portions of such a fragment which contained a large quantity of phosphate of lime would remain, while the other portions, containing chiefly carbonate of lime, would be dissolved away. On the other hand, they sometimes show a distinct concretionary structure, when, of course, their origin must have been in the main like that of other concretions, — merely a segregation of the minute particles of lime phosphate, originally

diffused throughout portions of certain strata, until an irregular concretionary nodule was formed.

Clay Deposits. — As will hereafter be seen, aluminum and alum are not extracted from the kinds of clay which are commonly met with, since they are not commercially suitable for the purpose, but, as is well known, many clay deposits, which would not be suitable for the manufacture of aluminum or of alum, are extensively mined and are used for other purposes, such as making brick, cement, pottery, etc. These beds of clay are often due to the superficial disintegration of the underlying rocks, when they are regarded simply as soil. Very frequently, however, they form distinctly stratified beds, as, for example, in the coal measures, where they are found immediately associated with and very often underlying the coal seams. These deposits are known by the name of *fire clay*, since the material is used for making fire brick. Very pure deposits are used for making pottery, and especially the unctuous material which is known as *kaolin*, which is simply a very pure form of clay, largely derived, it is supposed, from the disintegration of the mineral feldspar.

No matter to what such deposits of clay may owe their commercial value, it is clearly seen that they must necessarily fall within the legal classification of stratified deposits, and within the operation of the law which is applicable to such deposits. In the case of clay deposits or clay seams accompanying coal seams, they present no important points of difference in their mode of occurrence and stratified character from the latter, and necessarily the same legal reasoning must be applied to them, except so far as modified by statute.

Salt. — Salt, or chloride of sodium, is a mineral — partly metallic in its nature, but not popularly so considered — which is very extensively mined in different parts of the world, and in some cases it is found in a very pure condition. It is always found occupying distinctly stratified beds, the exact origin of which is in some cases rather obscure, but it is sufficient to say that it has certainly been derived from the sea or salt lakes. That is to say, the deposits of rock salt probably originated on the sea bottom, or rather at the bottom of an enclosed lagoon which was filled with sea water at the spring tides or at other seasons, evaporation afterward taking place, leaving the salt behind. In many cases,

probably in most cases, they were, however, certainly formed in much the same way from the gradual drying up of salt lakes, leaving behind a heavy deposit of salt, admixed with impurities. These beds, now covered by many feet — hundreds or even thousands — of subsequent sediment (now rock), are often mined, after being reached by a shaft, by the method practised at Salzburg, Austria, of being flooded with water, making a saturated salt solution, pumping the same up to the surface and afterward evaporating the water. There are a great many mines of salt in the United States, as, for example, in New York, Michigan, Wisconsin, Kansas, Louisiana, etc.; but the beds which contain it, though they may be deeply buried, are so distinctly stratified that they do not need further description here.

Gypsum. — This is a mineral — composed of the combination of lime, sulphuric acid, and water — which is quite extensively used in the arts, and somewhat in agriculture. When very pure and massive, it is termed *alabaster*. It is used to make plaster of Paris and artificial marble. It has also other minor uses, but it is not necessary to discuss them here.

Gypsum generally occurs in quite extensive, though somewhat irregular, deposits, which are usually interstratified or associated with calcareous and argillaceous rocks. It is very often associated with the deposits of rock salt already described, but it is also frequently found where sulphuric acid, generated by the decomposition of pyrites, has had an opportunity to affect adjacent limestone. Being, however, usually in stratified beds, and of marine origin like salt, and very often in superficial deposits, it will be placed in the same category. There is nothing in its mode of occurrence to take it out of the class which for convenience is referred to as Stratified Deposits, and wherever found on government lands it should be so considered and so located.

Potash. — The metal potassium is rarely produced, but in the form of its salts it is of great importance in the arts. Potash, though produced artificially on quite a large scale, is also, at present, largely derived from certain irregularly stratified deposits of a saline nature, the most notable of which are in Germany, at Stassfurt. It is very abundant in nature, since it composes, for instance, a part of the mineral feldspar, a very common rock constituent. It is also found in other minerals and in sea water.

The occurrence of feldspar, as well as its appearance, is somewhat like that of quartz, and like it, though most frequently met with as a rock constituent,¹ is often found in segregated masses and in small veins, especially in gneissoid or granitic regions. However, potash is not derived from this mineral, common as it is, because, owing to its association with silica, it is too expensive to recover it. When not produced by ordinary means, it is usually derived from the above-mentioned salt deposits with which it is associated, and which contain little or no silica.

Generally speaking, it may be said that the deposits in nature from which it is derived would be regarded legally as being stratified, according to the classification which has been adopted in this book.

Alum. — This is a useful mineral, which, though partly composed of a metal (aluminum), is not popularly regarded as metallic. It is, like salt, a mineral which is valuable in itself and not because of the metal which it contains, or in order to recover which it is mined and treated. Large deposits of impure alum, relatively speaking, are found in the western United States. It usually occurs as a very irregular deposit, but sometimes it is quite distinctly stratified. It is simply a hydrous sulphate of aluminum with an alkali metal (potassium or sodium) added. The potash alum seems to be more common in nature than the soda alum. Instead of forming a massive bed, alum is sometimes found in a mealy condition or as an efflorescent crust. A great many shales contain large amounts of alum, and are known as alum shales. These shales are simply original mud deposits, and therefore they, or any beds of alum, must be regarded as distinctly stratified deposits. The impurities are usually magnesium, manganese, iron, etc.

The purer alums of commerce are now largely manufactured from the mineral *bauxite*, from which aluminum is also produced, and which will be referred to hereafter. (See description as to mode of occurrence, etc., under *Aluminum*). This mineral when found upon government land should be legally classed as stratified, and, owing to the superficial though pockety nature of the deposits in which it is found, should usually be located as a placer claim. Though formerly imported from France and Ire-

¹ The minerals quartz, feldspar, and mica compose granite.

land, it has been found; and is quite largely mined, in Georgia and Alabama.¹

Silica or Quartz. — The silica for making glass, etc., is largely obtained by using common white sand, — which is nothing, after all, but very minute, rounded, water-worn grains or minute pebbles of quartz, — although sometimes great veins or segregated masses of quartz are mined for this purpose, as well as certain quartzose strata. Quartz is used with feldspar, which frequently occurs in nature in a somewhat similar way, *i. e.* in veins and in segregated masses, for making pottery as well as in making ordinary varieties of glass. As has been mentioned, the close combination of quartz, feldspar, and mica make the common eruptive rock granite. Quartz is the most common of the various veinstones, which are mined in connection with the valuable metals which they contain (gold, silver, etc.), and which will be treated of hereafter.

Agate and *Chalcedony* of various kinds are other forms of quartz which are mined and shipped for commercial purposes.

So-called *Petrified Wood* is quartz or silicious matter which, originally contained in solution in water, has replaced with microscopic exactness the vegetable fibre of old trunks of trees, etc., surrounded by and soaked with these silicious and, in many cases, probably hot waters.

Infusorial Earth or *Tripolite* is silicious matter which has been formed from the accumulations of billions of silicious carcasses of microscopic life-forms upon the sea floor. Sometimes strata of very considerable thickness are known to have been formed in this way, but apparently such strata are of late Tertiary origin. (See page liii.) As has been suggested, some of the geologically old chert or flint beds and other extremely silicious strata of great age may have had a somewhat similar origin, though they are now generally supposed to have been formed by the accumulations of very finely divided silicious sediment (excessively minute grains of sand or quartz) deposited far from the shore.

Borax. — This is a mineral which occurs rather sparingly, though it is considerably used in the arts, and as there are some deposits

¹ Ammonia alum, instead of existing in a crude state in nature, is now extensively manufactured from the waste of gas works, and has largely taken the place of potash alum. This leaves deposits of bauxite and of soda alum as the only ones which possess commercial importance.

of it in America (Nevada, California, etc.), it is worth passing reference. It is usually found mixed with impurities upon old lake bottoms or around the edges of present or recent lakes, in very irregular deposits. It is therefore, according to the classification adopted, superficial and stratified.

Many of the other non-metallic minerals, or those which are popularly so considered, are not mentioned here, owing to the fact that they have not yet been discovered in the United States in sufficient quantities to possess very great commercial importance. Some of the following:—like salt, potash, and alum,—are really metallic in their nature, that is, partly composed of a metal; but as they are not commonly so regarded, and are valuable in themselves and not for the metal they contain, they have been purposely placed under the general head of non-metallic minerals.

Nitrate of Soda (Chile saltpetre) is one of these. Chile enjoys the practical monopoly of the production of this valuable material: It is chiefly used in the manufacture of fertilizers, but is also used in the manufacture of nitric acid, and to a certain extent in that of gunpowder. For the latter purpose the soda is eliminated and potash substituted, making nitrate of potash, or common saltpetre. Nitrate beds, though of irregular extent and occurrence, are very distinctly stratified marine or salt-lake deposits, and would, of course, if found in this country, be regarded in the same light legally as all other stratified deposits.

The supply of *Iodine* of the world is derived from treating the substance (*caliche*) from which nitrate of soda is obtained. The crude substance contains extremely small percentages of iodine, but sufficient to make it profitable to reclaim it, as it brings a high price, and the consumption is comparatively small.

Fluor-spar and *Calc-spar* (veinstones like quartz) are largely used as fluxes, especially in Europe. Fluor-spar is produced in very small quantities in the Mississippi valley. It is for certain purposes the best available flux known, and both it and calc-spar, like quartz, are usually found in cracks or so-called veins, produced by previous fracturing of the rocks. They are also found forming so-called pockets in limestone as well as in the cracks of this rock, replacing portions of it which had been previously leached out and removed by the dissolving influences of water.

Deposits of *Fuller's Earth*, *Soapstone*, *Mica*, and *Asbestos* come under this same general division, but a detailed description of their mode of occurrence is not considered necessary. *Mica* often occurs in bunches or nests in dikes of very coarse granite, or sometimes in granular limestone, and is also associated with *apatite* in Laurentian rocks in Canada. *Asbestos* is often found filling small cracks in serpentine. (See *Stockwork*.)

(b.) *Stratified Metallic Minerals, or those minerals which contain a metal or metals, for the extraction of which they are mined and worked, and yet occur in nature in a more or less stratified manner.*

Iron. — Commercially considered, the most important under this head are, perhaps, the minerals from which metallic iron is extracted. It is not found in nature in its native or metallic state, at least, except in small specimens, which are mineralogical curiosities. Many of these are meteoric in origin.

The iron deposits of the world are of two great classes: first, those which were deposited as original sediments or beds, — usually by chemical action, — upon sea, lake, or marsh bottoms; and, secondly, those which have been derived from the oxidation of great masses of iron pyrites.¹

(a.) Deposits of the first class are often as simple in their mode of origin and as easy to understand as deposits of coal, or those of fire clay. Very frequently they are quite as extensive as the latter, and sometimes a small stratum of iron ore, not more than a foot or two in thickness, will be found to exist over many square miles. When mixed with carbonaceous material it is known as black-band ore. Much of the ore of Scotland is of this description. These stratified iron-ore deposits have been formed through all geological times, but seem to have been more generally deposited in the Silurian up to the Carboniferous eras, although many similar beds were deposited in late Tertiary times, as, for example, in Texas. The iron was deposited or precipitated probably in the original form of carbonate; but where it has been exposed or brought to the surface by the action of erosion, it has always

¹ Masses of iron oxide or ordinary iron ore are sometimes due to the oxidation of the mineral *siderite* or carbonate of iron. These are, however, of small importance, relatively speaking. Carbonate of iron, or spathic iron ore, as it is often called, is nevertheless quite extensively mined in some parts of the world.

been converted into oxide of iron, usually the hydrated form, which is known as *brown hematite* ore. These deposits are frequently very impure, owing to the commingling of sedimentary material of different kinds, which was often deposited at the time that the iron was chemically precipitated from the water containing it in solution.



Diagrams showing roughly the Mode of Occurrence of Iron Ore in Michigan (Emmons).

The great supply of iron is not drawn from these sources, however, but from the deposits of magnetic and specular ore which are found usually in the so-called metamorphic or crystalline rocks of great age. Whether these were originally great masses of iron pyrites which became subsequently oxidized, or whether they were due to tremendous deposits of iron, originating in much the same way as has been explained, in the remote ages when the rocks, with which they are associated, were formed, is yet in many cases an open question. It would seem, however, that the latter is very much more frequently the case than the former, as, although often more or less lenticular in form, the ore bodies are usually distinctly interstratified or interbedded. It has also been suggested, owing to the noticeable paucity of iron in the adjacent rocks, that in some way the iron has been leached out of these rocks and segregated in the irregular lenticular masses which we now mine. While it is entirely possible that this may have occurred, it is very difficult of explanation. This much is certain, however, no matter what their origin may have been, they have often, if not always, been very greatly *enriched* superficially, and in very recent geological times, by the downward percolation of meteoric or surface waters, taking some of the iron contained in the exposed upturned edge of the stratum into solution, and redepositing this iron with the other iron below. In order to do this, they have often effected the process of replacement by substituting the iron for some rock below with which the original deposit was associated, in this way adding greatly to the purity of the ore. That is to say, in the

extremely gradual process of erosion the surface waters have been for ages constantly dissolving and removing this rock, and depositing in its place the iron which they derived from the upper portions of the iron-bearing stratum. It is simply another example of the process of replacement or substitution already described, and which, as we shall see, has played an important part in forming and enriching many of the metalliferous and other valuable deposits worked by man. The famous Mesabi Range of Minnesota, and mines in other districts in the Lake Superior region, furnish examples where this can be proved to have taken place on a huge scale.

Sometimes these masses of iron ore, especially when contained in the older rocks, are several hundred feet in thickness, and have great longitudinal extension. The ore usually varies from a pure magnetic oxide or *magnetite*, to what is known as a specular ore, or *red hematite*, or admixtures of these varieties. The latter (red hematite) is sometimes soft and sometimes hard, but more frequently hard. Often portions of these deposits, and especially deposits of the class to which reference will presently be made, are what is known as *brown hematite*, or *limonite* (from *leimon*, a meadow). Brown hematite ore is the chief ore of the southern United States, and in some cases seems to be due to the oxidation of an original carbonate ore.¹ In the great majority of cases in the southern United States this ore, as well as the so-called "fossiliferous" ore (impure red hematite), is found in rather irregular stratified deposits; but doubtless many of these deposits, like other iron deposits, have been enriched in the way above referred to.

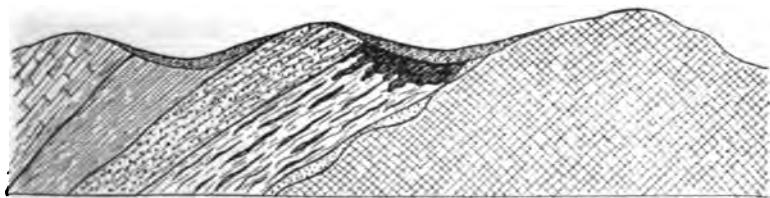
(b.) Deposits of the second class are those where the iron ore is simply and certainly due to the oxidation of original iron pyrites, to which mineral reference has already been made under the head of sulphur. This iron pyrites, when subjected to the oxidizing influence of the atmosphere and of surface waters, loses its sulphur and becomes oxide of iron, that is, ordinary iron ore. This may be a hydrated oxide, or by heat and by pressure, or other causes, the water may have been driven off, leaving it in the form of either magnetic or specular iron ore. A very considerable number of the iron deposits of the world are of this character, but in many, oxidation has proceeded to such a depth that mining

¹ It also frequently represents the oxidation of iron pyrites.

has not yet developed the absolutely unaltered iron pyrites, although this mineral often increases in abundance as depth is attained. For example, there is a huge cap of iron ore on the famous deposit of iron pyrites at Rio Tinto, Spain. Examples of this kind are more or less common throughout the Rocky Mountain region. Undoubtedly many deposits of *brown hematite*, *red hematite*, and of *magnetic iron ore*, some of great magnitude, are of this class.¹

Iron ore in its legal aspect is interesting, especially in the western United States; for in the eastern portion of the country, as will be seen hereafter, it matters little what the kind of deposit may be, owing to the fact that the common law rules that a man owns — where there has been no severance of the mineral estate from the ownership of the soil — all that may be found within his boundary lines extended vertically downward. It has, however, never been judicially decided whether an iron ore deposit valuable for no other metal which it may contain, should be located as a lode or placer deposit when upon government lands. Where it is certainly due to the oxidation of masses of original iron pyrites filling crevices or collected along some line of contact, as between an eruptive rock and limestone, and especially when it carries some other valuable metals, it would certainly seem that, *if it is sufficiently continuous*, it should be properly located as a lode claim, and not as a placer claim.

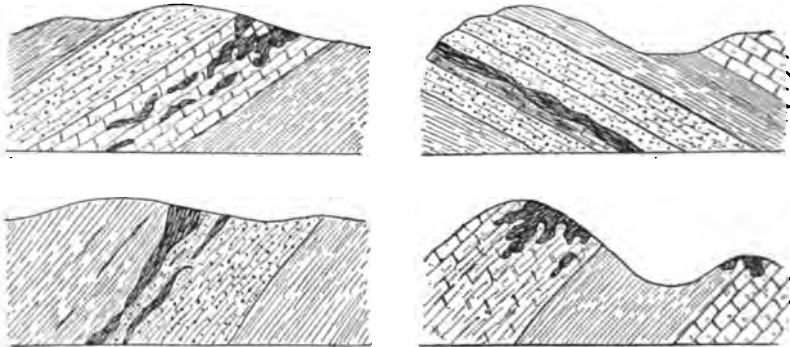
The following diagrams will illustrate very roughly the usual manner of occurrence of iron ore and make it more easy to understand the above distinctions.



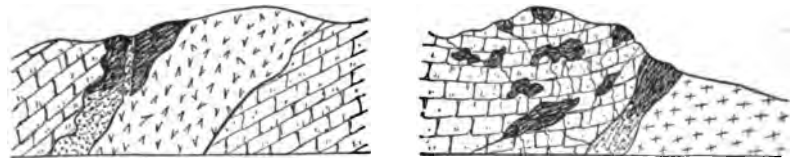
Ideal diagram showing Superficial Enrichment of Iron Ore Deposits, Michigan and Minnesota.

¹ These three ores when chemically pure — that is, when the iron contained in them is united only with oxygen, *which purity is never met with* — can respectively contain 59.8, 70, and 72.4 per cent of

metallic iron. It is very high grade ore of either class that shows a percentage six or seven units less than the possibilities mentioned.



Occurrence of more or less Stratified and Pockety — or Irregular — Iron Ore Deposits.



Mode of Occurrence of Contact Iron Ore Deposits which are certainly due to the Oxidation of Iron Pyrites.

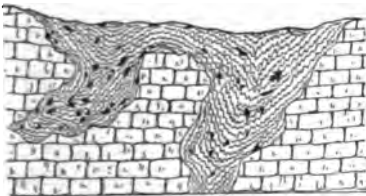
Manganese. — The principal use of this quite important metal is in the manufacture of steel.

It is derived principally from two ores, — oxide of manganese and carbonate of manganese. These ores, especially the former, occur quite abundantly in nature, although nothing like to the same extent as iron.

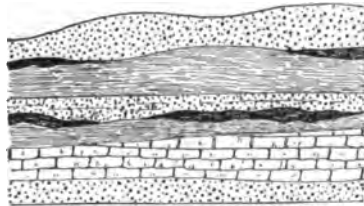
The chief supply of manganese is drawn from perfectly stratified sedimentary beds, as in Chile, Russia, Cuba, etc., although in the United States its occurrence is very much more pockety. In this country it is chiefly found in beds of clay resulting from the disintegration of some certain kind of rock, which may be either original sandstone, as in Virginia, or limestone, as in Arkansas. It is chiefly found in irregular masses varying from less than an ounce to many tons in weight. There is, however, every reason to believe that the manganese was in the original rock which has dissolved into clay; that is to say, when this rock rotted into clay the manganese ore remained in the latter in some cases in somewhat the same position as it was originally deposited in the sedimentary material which was afterward consolidated into hard

rock. But it is much more probable, in the majority of cases, that what has been referred to as the process of superficial enrichment may have taken place in the majority of these deposits in *somewhat* the same manner as in the iron ore deposits which have already been described, so that these nodular masses of manganese ore in the clay represent the *segregation* of this material, the rock which originally contained it having contained it in a much more disseminated condition. These masses are therefore much larger and more abundant than they would have been otherwise.¹

The ore is usually confined to a certain stratum or certain strata in a series of sedimentary rocks, and it adheres to these strata with great pertinacity. This is simply due to the fact that the conditions for the deposition or precipitation of manganese ore were present when these particular sediments were deposited, and were not present when either the older or younger sediments were deposited. Whether the ore was originally deposited in the form of a carbonate or as an oxide is not proven, though many think that, as in the case of some iron ores, it was originally deposited in the form of a carbonate and has been subsequently changed to an oxide. This, however, is of small importance here.



Occurrence of Manganese Ore in Clay resulting from decomposition of Manganiferous Limestone (Penrose).



Occurrence of Manganese Ore Interstratified with Sedimentary Rocks.

The other class of deposits are carbonate and silicate of manganese. The latter has never been used as a manganese ore, although it is quite common in our western United States, where it often marks the outcrops of fissure veins, having been oxidized superficially to the common black oxide of manganese. It is usually very impure. The deposits of carbonate of manganese are beginning to attract attention. For example, in the

¹ The peculiar mammillated or rounded appearance of these nodules lends force to this theory.

Pyrenees they are being worked quite extensively at the present time.

The mining of manganese ore in this country has so far presented very few legal difficulties, for the simple reason that all the deposits of this mineral have been usually in the eastern portion of the United States, where, as has been stated, the common-law maxim of *cujus est solum ejus est usque ad cælum* prevails. Upon lands belonging to the government there are, however, in the western United States, deposits of very impure manganese ore, which mark the outcroppings of some fissure vein (*e.g.* near Butte and elsewhere in Montana) or more irregular pockety deposits (*e.g.* in the Leadville district), as above stated. Should these classes of deposits ever possess value, the law applicable to lode claims would usually prevail, unless, as in the case of some iron or of the more valuable ores, the deposit should be of such a pockety or bunchy, that is to say irregular, discontinuous type, as to make this improper.¹ This will be made clear hereafter in discussing vein and kindred deposits.

Attention is simply called to the fact that deposits of manganese ore, which are valuable for the manganese which they contain, like some beds of iron ore, are in the great majority of cases found forming *distinctly stratified beds or parts of a distinctly stratified stratum, or in the clay derived from the decay of such a stratum*; and hence when so found upon government lands it would appear that the law as to the location of a lode claim should not be applicable to them, for the same reason that it should not be applicable to stratified beds or pockety deposits of iron ore, as distinct from iron ore found as the capping of a fissure vein or true lode. When so found, therefore, manganese deposits should, generally speaking, be located as placer claims.

Aluminum. — The ores from which this metal is extracted are rapidly assuming commercial importance. At present there are but two ores of aluminum broadly considered. One is known as *cryolite*, a large deposit of which is found in Greenland, but which is not common elsewhere. This mineral is composed of sodium, aluminum, and fluorine. As it is not found in large

¹ The ore in the croppings of fissure veins is, however, so impure and superficial that it is not likely ever to possess much value as manganese ore, though it is often valuable for the silver and other metals with which it is associated.

quantities in this country, it does not immediately concern us. It is sufficient to say that if ever found it would probably be found as a veinstone, and, like other veinstones, has been deposited in some crevice from solutions in water.

The other ore of aluminum is known as *bauxite*, named from the town of Baux in France, where it was first mined in quantity. It is to-day practically the only ore from which aluminum is obtained. It is sometimes referred to as a very pure, though usually indurated, kind of clay in the form of concretions, which, owing to the small amount of silica and of other so-called impurities which it contains, is available for the purposes of making the metal aluminum. Such a clay as is suitable for making good bricks, for instance, is not, on account of the large amount of silica it contains, at all suitable, in the present state of the art, for making aluminum, although it may contain a considerable percentage of the metal.

Bauxite is usually found in *segregated* masses or nodules (concretions) in aluminous clay, which is sometimes quite pure, but often is more or less impure, representing the decomposition of the superficial portions of some stratum of rock, usually limestone or dolomite (magnesian limestone). It is sometimes, however, found in a more compact form. The minerals which compose it were probably contained in a more disseminated form in the undecomposed or hard rock. When it has had such an origin, it much resembles some of the manganese deposits in the United States in its mode of occurrence and in the superficial, segregated, and nodular character of its deposits. While this theory of origin satisfactorily accounts for many of the phenomena observed in some of the European deposits, it does not apply to all of them, nor does it explain certain of the phenomena connected with the Georgia and Alabama deposits. The origin of these, as well as of the French deposits, is ascribed to the action of mineral springs or geysers. The deposits in the above mentioned States are found in connection with Silurian rocks, usually dolomite, but were very probably formed in Tertiary times through the agency of thermal springs. These waters are supposed to have come up through fault fissures and to have derived the alumina, which they held in solution and brought to the surface, from the underlying calcareous clay shales. This alumina is supposed to have been redeposited in a gelatinous form on or near the surface, during which or after

which deposition the concretions of bauxite were formed. In this way the basin-like character of the deposits is explained.¹ The French deposits, on the contrary, occur in more or less distinctly stratified beds, along with other lacustrine formations and in connection with Cretaceous limestone. They usually contain more iron than the ores of the United States. The chief use to which bauxite is put, however, is not in the manufacture of metallic aluminum, but of alum, *q. v.*²

Quarries of Building Stone, etc. — Quarries of every description — that is, of sandstone, limestone, marble, slate, and all other rocks useful for building or ornamental purposes — are regarded, from a legal point of view, *in the same light as sedimentary stratified deposits*, although technically speaking it is certain that many of them are not of sedimentary origin or stratified. These, for example, are quarries of granite or some eruptive dike, such as trap, or a quarry of a rock formed from the superficial deposition of presumably hot water solutions such as “Mexican Onyx” or the rock “Travertine,” of which the city of Paris is largely built, and which has had a different origin from common limestone. The eruptive rocks, however, with the exception of granite, basalt, trap, etc., are not quarried to any great extent, and therefore in a general way it is true that most quarries are of those rocks which form one of a series of sedimentary strata; such, for instance, are the red sandstone (brownstone), slate, and marble (crystalline limestone) quarries of New England. While the outcroppings of a number of fissure veins may be quarried in the western United States, *it must not be forgotten that these are simply the outcroppings of lodes, and that they must not be regarded in the same legal sense as a quarry of some common building stone.* Legally the common law maxim of *cujus est solum ejus est usque ad cælum*, which signifies in effect that the owner’s right is complete within the downward vertical extension of his boundary lines, and that

¹ For an exhaustive and recent description of the various American deposits see the Sixteenth Annual Report of the United States Geological Survey, Part III., — Mineral Resources, 1894, — page 547 *et seq.*

² The other metalliferous ores, or so-called metallic minerals, will be discussed subsequently and in their proper place. It must not be forgotten that the classifi-

cation adopted by the author is based primarily upon the geological (physical) similarities or differences of the deposits of the various kinds of mineral substances which are mined by man; that is to say, such points of similarity or of difference between their mode of occurrence in nature as causes the same or different legal reasoning to be applied to them.

he has no right to mine anything outside of these limits, applies to all quarries when the material quarried *is not a part of a lode deposit*. For this reason, under the United States law they cannot, when upon lands belonging to the government, be taken up otherwise than as a placer claim, which will be treated at length further on, and *to which the above maxim applies in contradistinction to a lode claim*. As will be seen hereafter, these two are very different, especially in respect to the rights of the owner with regard to following the ore deposit outside of his boundary lines.

Placer Deposits in General. — These deposits are always alluvial or detrital. By these terms is meant that the material forming the deposit is composed of boulders or gravel admixed with sand, and sometimes mud or clay, all of which have certainly been derived from the wearing away of solid rock, or rock in place, further up the ancient or present stream, in the valley of which these alluvial or detrital deposits are found. If one reflects upon what has been said under the head of erosion, it is at once seen that when the rocks in any drainage area contain veins, large or small, or other deposits of metals, these metals or their ores, or the solutions of these, will be carried down with the other material forming the country rock, in the carving or sculpturing out of the valley. If these metals or their ores are quite insoluble in ordinary meteoric waters, it also follows that they will be deposited and will remain with the pebbles or other material forming the alluvial deposit.¹ On the other hand, however, if they are soluble in such surface waters, they will be taken into solution and carried off, probably finally reaching the sea, if they should not be redeposited, as will be explained later. Now, generally speaking, there are only a few metals that are with great difficulty soluble in such waters. These are principally gold, platinum, and tin. There are two or three others equally insoluble, such as iridium, palladium, etc., but they are unimportant. All other metals — copper, silver, etc. — when exposed for a long time to the chemical action of the atmosphere and surface waters, are slowly taken into solution and carried off, and are not found, at least to any great extent, in such detrital or gravel deposits.

These so-called placer deposits have supplied by far the greater amount of gold that has been produced in the world. They also

¹ See further description of formation of gold placers on pages xciv, xcv.

supply practically the entire amount of platinum and most of the tin of the world. In the case of the latter metal, however, instead of being in a pure or native state, it is found in the form of tin ore or the so-called "tin stone" (oxide of tin), which, like the pebbles of phosphate rock already described, is soluble with great difficulty, and is therefore left behind with the other insoluble matter, such as the ordinary quartz and other pebbles or sand with which it is associated.

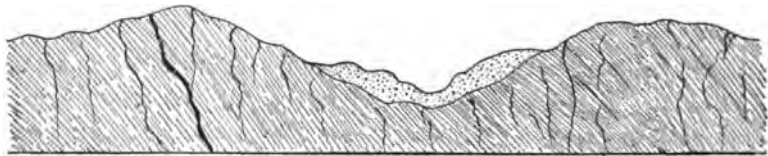


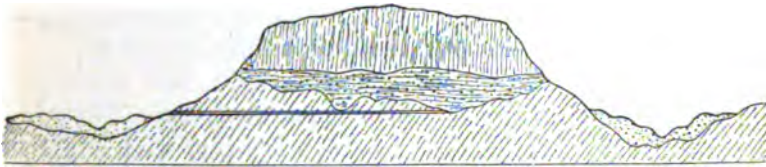
Diagram showing Origin of Auriferous Gravel.

These stratified beds of gravel or so-called placer deposits are of such vast commercial importance that they deserve to be treated of in some detail, and classified by the name of the metal for which they are worked. The description above given is sufficient to give a general idea of what they are.

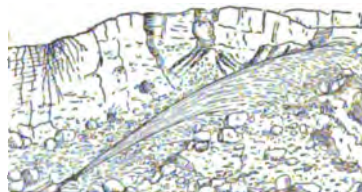
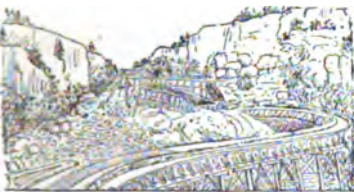
Gold Placers. — As above stated, a very large portion of the gold of the world is derived from this source. In our western country gold to the value of hundreds of millions of dollars has been taken from various placer deposits which have been worked with varying success since the discovery of gold in this form in California. These placer gravels have been in some cases consolidated into hard rock, forming a bed of grit, — or conglomerate, as it is called. But usually these gravel beds are as yet in an unconsolidated state, and are therefore easily washed down by the action of powerful jets of water. The accompanying illustration gives an idea of how such a gravel bank is attacked. They are often worked, however, in other and very much more primitive ways. In many cases the gravel is overlaid by a flow of lava, — which is of course now in the condition of hard rock, and has in itself prevented the washing away of many important gold bearing gravel beds. An illustration of this is also given to show two things: first, the great amount of material removed by erosion; and, second, that the present mountain top was once the bottom of a river, the valley of which was afterward followed by an outpouring of lava. No doubt these placers give rise to other

placers; but it is certain that the minute seemingly water worn particles, or *perhaps* the larger nuggets of the gold, were originally in this form or another in veins, great or small, — that is to say, *in place* in the solid rock which formed a part of the mountain range.

It has been suggested, however, and probably with some truth, that the minute nuggets of gold, or even those of considerable size, which are extracted from placer deposits have been formed in the gravel in their present position by precipitation from the creek or river water containing the gold in solution. If it is admitted that gold is even slightly soluble in the water which most creeks and rivers contain, then this theory would have much to recommend it. It seems remarkable that these nuggets of gold, sometimes of very considerable size, are *very rarely* met with in vein mining, though abundant in placer gravels. Sometimes there is found what is known to the placer



Section of Table Mountain, California, showing Old River Gravel covered and protected from Erosion by a bed of Lava (Whitney). Later River Gravel shown on either side.



Flume and method of attacking Gravel Bank in Hydraulic Mining (9th Ann. Rep. State Mineralogist, California).

miner as "wire" gold, the edges of which are very sharp, and do not show any evidence of having been rolled or abraded by the action of water and sand. There seems to be every reason to believe that the so-called "wire" gold of the placer miner was deposited in its present position in the gravel or sand surrounding

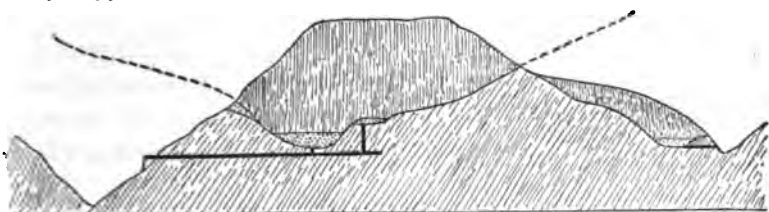
it, from waters which had derived the gold from a section of the country nearer the source of the stream traversed by gold bearing and usually pyritiferous veins. If this is admitted, it is easy to understand how what may possibly be small nodular segregations — which we know as grains or nuggets — may have been formed.¹ The fact that the richest portion of the deposit is near or upon bed rock, or near or upon a “false” bed rock, is explainable by this theory. This view of the disposition of gold in placer gravels finds favor among many scientific men ; but it is not necessary to discuss it further.

It does not necessarily follow that the discoveries of rich vein deposits nearer the source of the stream (present or ancient) will follow upon the discovery of a rich placer ground below ; for, as can be readily imagined, a great number of small veins, each in itself too small to be profitably worked, may yield when eroded a large amount of gold in the aggregate, and form a very much more valuable placer ground at varying distances below the position of the veins. It is simply nature’s way of concentrating gold, — an accident which has been taken advantage of by man.

There are some rocks (conglomerates, grits, and sandstones) which now contain a great deal of gold, copper, etc., but which certainly did not contain these metals when they were laid down as sediments. These rocks are in the majority of cases tilted or turned on end, and some deep break has occurred either in them or in close proximity to them ; so that the waters or vapors containing these metals in solution, and which have subsequently ascended through or near them, found in them a suitable repository for their solutions. The famous Calumet and Hecla copper conglomerate offers a good example, as well as certain copper mines in Bolivia in sandstone, and some of the gold in South Africa is said to occur in much the same way. That is to say, it is found filling some of the interstices between the pebbles in a way that makes it very probable that it got into the stratum subsequently to its consolidation and being tilted, — probably to its present position, — and not as grains and nuggets when the deposit was accumulating. The writer has seen a deposit of somewhat similar character to this in South America, and there

¹ It has been pointed out, on the other hand, that these grains and nuggets of gold do not present the round or peculiar mammillated appearance of many nodular segregations.

is no doubt that it is of more common occurrence than is generally supposed.¹



Section showing Auriferous Gravel overlaid by Lava, also effect of Erosion since the outpouring of the Lava (9th Ann. Rep. State Mineralogist, California).

These latter deposits would very probably in the majority of cases (*always providing* that the ore of valuable metals in them is reasonably *continuous*) be regarded from a legal point of view in the same light as fissure veins or as lodes, and under our United States statutes should be so located. They are mentioned simply in order that no confusion may arise. It is usually very easy to determine whether they were originally placer gravels, or whether the metals which they contain found their way into them subsequently and after consolidation and upturning of the rock. In California it has been decided that an old bed of placer gravel, now covered by a capping of lava and tilted so that the gravel bed dips at a considerable angle, has nevertheless not lost its distinctive character as *placer ground*, and should be located as such, and that therefore a location upon it as a *lode* is improper.

Platinum Placers. — As above stated, practically all the platinum of the world is derived from deposits of gravel or placer ground. This country supplies only a small quantity of this valuable metal, the great majority of the supply coming from the Ural Mountains in Russia. It is found, however, in small quantities in Northern California, Oregon, Washington, throughout British Columbia, and in small quantities in South America, nearly always associated in these localities with gold in the gravel. Quite a good deal of iridium is found along with the platinum, but it possesses at present comparatively little commercial importance. As in the

¹ Some geologists, however, think that the gold in the famous conglomerate bed of South Africa was deposited therein when the bed in question was in the form of unconsolidated gravel. In other words, that the gold accumulated therein in the same manner that it accumulates in any placer deposit or gravel bed forming along a river bottom or sea beach, as already described.

case of gold, platinum is found in small seemingly water worn and irregularly rounded nuggets or minute grains, which have certainly been derived from some vein or other deposit in the solid rocks further up the stream, and perhaps have been worn to their present shape by the action of water, or rather, to speak more accurately, by being rolled for ages by the force of mountain torrents along with the grains of sand and the gravel, admixed with which they are found.

The same theory, however, which has been suggested with regard to the formation of gold placers (see discussion on pages xciv and xcv) may apply equally to the formation of platinum placers.

Tin Placers. — A very considerable portion of the tin of the world is found in gravel deposits, and is known as "stream tin." It has always certainly been derived, like the foregoing, from some vein or other class of deposit carrying tin ore in the solid rock formation further up the stream, — in the present or in the old bed of which the tin stone is found. The other two metals, gold and platinum, are always found in their native state, simply because they usually occur in this state in nature. Tin, however, as has been pointed out, does not occur native, but as tin ore, usually as tin oxide, which is very insoluble. It is therefore retained in the gravel below the tin veins or other tin deposits. Like the former, it is always very much water-worn, but also like them it can be readily separated from the pebbles or sand with which it is associated, owing to its greater weight.

II.

UNSTRATIFIED MINERAL DEPOSITS.

We have now considered all of the principal kinds of deposits, which, for the sake of convenience, we will call stratified or sedimentary mineral deposits, and to which the common law maxim of *cujus est solum ejus est usque ad cælum* always applies when the owner of the soil is the same as the owner of the mineral rights; that is, when there has been no severance of these estates. Although, as we have seen, they may not always be technically stratified, or in a geological sense sedimentary in character, they are such under the legal classification adopted in this book. In

other words, the same law which would apply to any perfectly stratified mineral deposit, technically speaking, would apply in a general way, and, excepting the cases to which reference has been made, to all of the deposits which have been mentioned in the foregoing pages, *unless expressly exempted by statutory provision* or Land Office Regulation, — *e. g.* coal and salines.

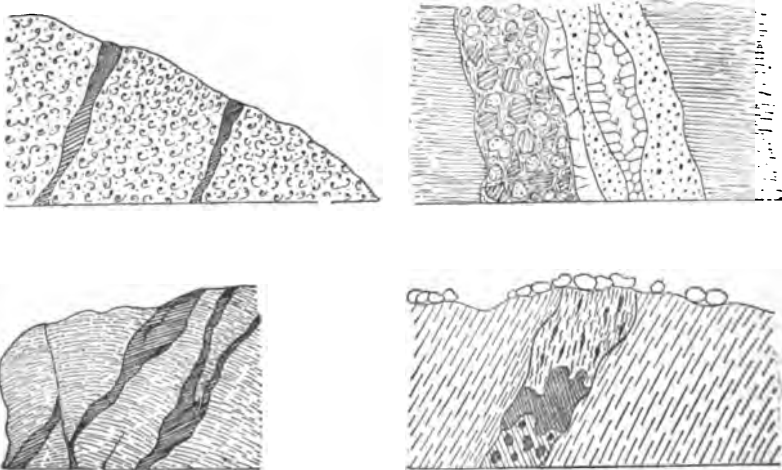
We now come to treat of the mineral deposits belonging to the other great class, which are not only wholly different in a geological and mining sense, but especially in the United States are different in a legal sense. For the sake of convenience and simplicity we will call them *Unstratified Mineral Deposits*, a large proportion of which are properly known as vein or lode deposits. The various valuable metals of the world are usually recovered from this or the other classes of deposits described in the following pages; such as, for example, antimony, arsenic, bismuth, cobalt, a part of the gold, copper, a part of the iron, lead, mercury, nickel, a small part of the platinum, silver, a part of the tin, tungsten, zinc, as well as a number of others of less importance.

Generally speaking, a vein or lode represents *some break or rift in the rocky crust of the earth, usually penetrating to great depths, through which channel mineralized waters have ascended, and in which, on the sides of which, or in the rocks adjacent to which, they have deposited their mineral solutions until these have slowly filled and choked up the crevice.*¹ It must not be thought that these rifts were originally necessarily always wide-open cavities, for in many cases it is certain that they were very often simply small cracks, the original distance between the walls being, perhaps, in many cases less than an inch. This, however, has been sufficient to admit of the ascent of hot mineralized waters, which, owing to their peculiar character, have often, though by no means always, dissolved away a portion of the wall or country rock on either side, sometimes one, sometimes both, and deposited in the place of this rock some of the mineral matter which they contained in solution. These waters appear to have contained a large amount of sulphur, or at least to have been accompanied by an abundance of sulphurous vapors. In this way the common combination of this element with nearly all of the metals deposited in this manner is explained. The exact source of much of the mineral matter so deposited, and especially of the valuable metals

¹ See extended discussion of veins or lodes in the next division.

contained in it, will, as has been suggested, probably remain forever unknown to us, for these metals have been originally derived from depths which can never be subjected to our examination. It is not necessary in this work to go into a more detailed discussion of the source of these metalliferous waters, or as to the manner in which they derived the metals which they subsequently deposited.

The author is, however, ready to admit, and anxious not to neglect to state, that owing to certain more or less well-known causes the upper or superficial portions of many veins and other deposits of nearly all metalliferous ores frequently show, and often to a remarkable extent, evidence of what is known as superficial enrichment. This, as has been thoroughly explained in the case of iron ore, simply means the concentration or the enrichment of the ore in the upper portions of a deposit which have been exposed to the chemical (oxidizing) influence of the atmosphere and of surface waters. This enrichment of the superficial portions of an ore deposit has taken place more frequently, and is more generally applicable than is supposed. That many mines of the world are shallow, the ore ceasing to maintain its value as the vein is followed downward below the depths to which the oxidizing agencies have been in operation, is largely due to this fact. It is simply, like the placers, another case of nature's



Diagrams illustrating Occurrence and General Character of Fissure Veins; the last is illustrative of Superficial Enrichment (Phillips, Dana, Le Conte).

accidental concentration of riches which is taken advantage of by man.¹

It does not always follow that the hot waters which originally brought up the mineral matter have come up through some more or less straight break or crack, but it often happens that they have gradually worked their way up from the depths from which they derived their mineral solutions, through any cracks or breaks, great or small, which they could find, and at the same time, by acting very irregularly, and by dissolving out isolated and frequently disconnected portions of the rock, through which they passed, have deposited their load of mineral matter in these places, or at such other places where the conditions for deposition were favorable. The result of this is that we often have extremely irregular and disconnected deposits, or what are known as pockets, nests, or bunches of ore. These occur most frequently in a rock which in itself is easily soluble, chief among which, as is well known, is limestone. In this connection one has only to remember that most of the caves of the world are in limestone strata, and that these great caverns have certainly been eaten out or dissolved out by the slowly acting agency of water, hot or cold, through countless ages. Some eruptive rocks, however, also readily admit of this process of replacement or substitution. Hot waters would of course dissolve such a rock more readily than cold waters, owing to the action of which many caves are supposed to have had their origin.

These irregular deposits will be described at length in their proper place, *but the importance of having clearly in mind the distinction between them and the more regular veins or lodes cannot be overestimated*, because few things have given rise to so much litigation in the United States as the physical and geological

¹ It has been ingeniously suggested by Professor R. A. F. Penrose, Jr., that in many instances there has not been the great amount of erosion that is commonly supposed to have taken place since the filling of the vein or other kindred deposit with the valuable mineral matter which it contains. He has further suggested that if this is true, it is easy to understand why there should be a greater deposition of certain mineral solutions nearer the surface than at great depths, simply because of the fact that the hot waters containing

them would be under less pressure nearer the surface than at great depths, and would be apt to deposit the solutions which they contain as they approach the surface owing to the relief of pressure. This is a very able explanation, and one which probably contains much truth. The subject, however, is a very vexed one, and but little is known concerning it. The conditions surrounding deposits in different localities are so widely different that it is impossible to lay down any general rule.

nature of a given ore deposit. It makes a great difference whether or not it should be regarded in the eye of the law as a vein or lode deposit, *and made to possess all the legal attributes of such a deposit*, or whether it should be regarded as one of a more uncertain, pockety, discontinuous, and disconnected nature, which, like a quarry of building stone, *is properly located only as a placer deposit* when upon lands belonging to the government.

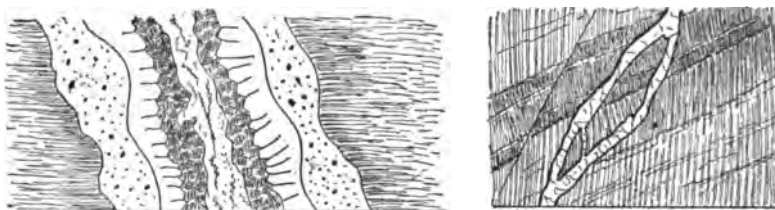
The difference between the following classes of deposits are clearly defined, and are easily appreciated by any one who is not only scientifically familiar with the subject, but who has also had wide experience in many different kinds of mineral deposits. That the testimony of a man of no scientific knowledge, and whose experience has been limited perhaps to a single mining camp, should be taken upon a subject involving such important interests is preposterous, although it is just such testimony as this, followed up by a lack of knowledge on the part of lawyers and judges concerning the fundamental differences between these classes of metalliferous deposits, which has given rise to so much confusion in our mining law. For the reason that a large proportion of the mining litigation in our Western States, especially with regard to gold and silver deposits, has been directly or indirectly based upon the differences between the following kinds of deposits, and that the question of the proper classification of a given valuable deposit is certain to be frequently raised again, the different characteristics of ore bodies will be described in the following pages at considerable length.

While the deposits worked for the extraction of these two metals, gold and silver, have been, and will continue to be, most important in mining, as well as in a legal sense of those which are worked in this country, especially in the portion of it west of the Mississippi River, it must be remembered *that the kind of metal or "other valuable mineral substance" which the deposit contains has nothing whatever to do with the geological or legal distinctions which will be made.* For instance, exactly the same remarks as have been made with regard to gold and silver deposits would apply to deposits of antimony, arsenic, bismuth, cobalt, copper, in some cases iron and manganese, lead, quicksilver (mercury), nickel, tungsten, and zinc. In a word, it is always the geological peculiarities of a given deposit, and not the character of the ore contained in it, which determines the nature of the legal reasoning which should properly be applied to it.

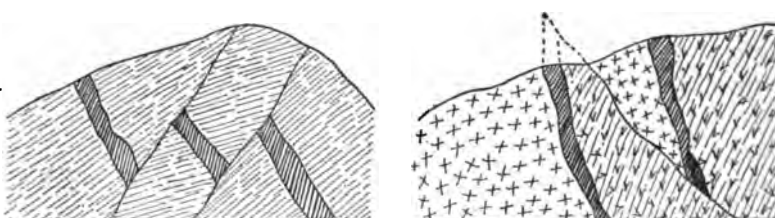
A. UNSTRATIFIED MINERAL DEPOSITS WHICH ARE REGULAR.

(a.) *Fissure Veins and True Lodes.*

Generally speaking, these are better known as *Vein deposits*, or frequently as *Lode deposits*. They must not be thought to be always a vertical crack, filled with mineral matter, running for a great distance across the country, and uniformly rich throughout its entire lateral and vertical extension, for such veins are rare, and, practically speaking, are never met with. Fissure veins are sometimes vertical, but more frequently dip at varying angles. They are thick at places, and at other places very thin, and frequently seem to disappear entirely, — nothing but a mere crack indicating their continuity, — to reappear again in the same line. They usually are more or less straight, but are frequently crooked. They are often broken and faulted, so that it is often difficult to recognize and state positively that the different portions belong to the same or the original vein. In fact, the breaking and the subsequent separation of parts of a fissure vein have given rise to some very interesting legal questions. Generally speaking, if one can positively identify the broken and detached portions of the vein beneath the surface, the owner of the upper portion, or that which outcrops, has a right to follow the portion of the vein which has been broken off, and removed some distance from the one which he has been working, provided the break has not removed it to an unconscionable distance. Of course, if faulting should make the vein have two outcrops, it would be unreasonable to give the owner of the highest outcrop the right to follow that portion of the vein which outcropped on the claim of his neighbor. (See explanatory diagram.) This is, however, a most unusual occurrence, and it is usually just as easy to identify portions of a vein as belonging to one original and continuous vein, as it is to identify and place together the different pieces of the so-called "glass snake" after it has been disjointed. If, on the other hand, there are several veins of much the same size, etc., in close proximity, and of much the same character, it rarely becomes difficult to identify the separated portions in it. Very fortunately, however, no two veins are exactly alike, and they usually present such different characteristics that their separated portions can be very easily identified. Moreover, it is unusual that there are two large or valuable veins in very close proximity to each other.



Section of Banded Fissure Vein and Horse (Phillips).



The Effect of Faults on Fissure Veins.

Dimensions or Thickness. — The size of a true fissure vein may vary from a fraction of an inch to in some cases as much as several hundred feet. The latter great deposits are often, though not always, more in the nature of contact deposits than true fissure veins. These contact deposits will be described in the next division. The usual size of veins, which are commonly worked for the valuable metals which they contain, vary from a few inches to forty or fifty feet; but it may be said that, generally speaking, they are less than twenty feet in width. They seldom maintain their thickness for any great distance, but are apt to get thinner and thicker as they are followed along their course, giving rise in some cases to roughly lenticular-shaped bodies of ore.

Quality and Character of Contents. — Veins vary much in the quality and richness of their contents, and it often occurs that a number of metals are found more or less mixed together as they were deposited in the same vein; such as gold, copper, silver, iron, manganese, lead, zinc, antimony, bismuth, etc., most of which are usually combined with sulphur, at least in that portion of the vein which has not been subjected to surface influences which have caused this element to be totally or partially eliminated. It is only when one of these metals predominates, not in

quantity, *but in commercial value*, that a vein is called a gold, a copper, a silver vein, etc. On the other hand, it sometimes contains only one or perhaps two of these metals; but it is not necessary here to go into these vagaries of ore deposits. Of course the principal filling of the veins is the so-called gangue, which is usually some veinstone, such as quartz, calcite or calc-spar, barite or heavy-spar, fluor-spar, etc., quartz being by far the more abundant. All we are concerned with is, as already said, the *character, that is, the physical features, of the deposit* in which the ore is contained, and *not the kind of ore or valuable substance in the deposit.*

The ore in a vein is apt to vary considerably in quality, that is, in character, as well as in value, along the strike of the vein, or as the vein is followed along its course, and this fact is noticed either at the surface or at any depth below the surface. A fact worth careful consideration in this connection is that what are known as "ore-shoots" can certainly be demonstrated to exist in nearly all fissure veins; that is, the bodies of the rich ore in the vein seem to follow a course which may be described roughly as being diagonally across the vein, though contained solely in it. If the vein is *dipping* to the east, and *striking* north and south (*i. e.* having this trend across the country) the ore-shoots will dip sometimes steeply, at others at a low angle, *often in a discontinuous fashion*, either to the north or south, but rarely follow the dip of the vein, although, of course, contained in it. A curious parallelism has been observed with regard to these ore-shoots, so that in running a tunnel which follows or is, so to speak, in a vein, one will get into rich ore, then in a short time pass out of it, go a considerable distance through barren vein stuff, come into rich ore again, remain in it a short distance as before, then pass out again, etc. A satisfactory explanation has not yet been offered for the origin of these ore-shoots or ore-chimneys of valuable ore in fissure veins or contact deposits; but that they exist, there can be no question. The law, however, is not much concerned with them, for the simple reason that in following a vein along its course *one is definitely bound by the vertical downward extension of what are known as "end lines," and cannot transgress them*, even though the ore-shoot should dip out of his claim into that of his neighbor. As will be pointed out further on, he can follow the vein or lode itself on its *dip* outside of his "side lines"

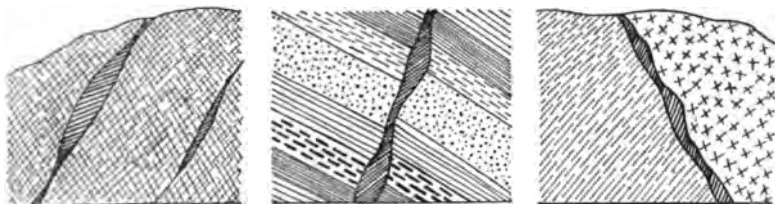
indefinitely, being limited, however, when he does so, to the territory included between the extension of his end lines, which, as will be seen, must always be parallel.¹

It has been stated that a fissure vein must have selvage or clay on its walls. This is by no means true. The fact that clay is often found on the wall of a vein is usually due to either the fact that surface waters have found an easy passage through the so-called vein, and have dissolved out some of the rock on the underside of it, making it soft, and producing a kind of clay or the so-called selvage, or that a slipping has taken place along the sides or walls of the vein subsequent to its formation and being filled with mineral matter. These veins in which the so-called selvage is observed are not to be distinguished in a legal or geological sense from any other veins where no such phenomena are observed, and where the vein is cemented hard and fast to the adjoining country rock on either side.

Very often veins are found occupying old faults. Sometimes it is possible to prove that there was a large amount of clayey material filling this fault plane, due either to the rubbing together of the two sides, or partially to the solvent effect of unmineralized waters passing through the crack or fault and depositing sediment in it. *This triturated or clayey matter has very often been subsequently converted into quartz, or some other common veinstone, and ore,* by the process of replacement which has already been described. The mineralized waters which have accomplished this result of substitution of ore for the original matter filling the fault plane were, as already pointed out, probably hot, and came from great depths, having their load of mineral matter in solution. In some cases it can be shown that the same crack has been subjected to more than one mineralization; that is to say, at different periods after the fissure was formed hot waters made their way up through it, depositing sometimes the same and sometimes different kinds of mineral matter. Especially is this true when it can be shown that the vein has been subjected to move-

¹ As will be seen hereafter, however, if a claim has not been located correctly, that is along the course of the vein, and the latter passes out of the side lines, — in other words crosses the claim instead of running lengthwise with it, — the "end lines" are then regarded in the eye of the law the "side lines" and *vice versa*, and the owner of the apex of a true lode having such a course may follow the same on its dip out of the end lines of his claim; and he is limited to the territory included between the extension of such end lines in the same manner as if they were his original and actual side lines.

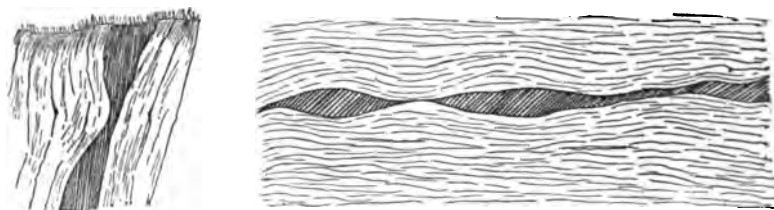
ments subsequent to its being first filled with so-called "vein-matter" and ore.



Common examples of Fissure Vein deposits occupying old Fault Planes.

It must not be thought that the majority of these cracks were wide-open fissures before they were filled. It is at once seen that this would be an absurdity, for nearly all veins require a great amount of timbering or other supports to keep the walls apart. On the other hand, there have been cases of original wide open fissures, *at least for a portion of their extent*, which have been filled with mineral matter; and when this occurred it is very interesting to observe how regularly the various ores have been deposited. In such cases they have usually been deposited in bands which agree perfectly on either side, showing that the material in the centre — often a mass of interlocking crystals of quartz — was deposited last, and that until it finally closed up the fissure or crack, the walls, at least for certain distances, certainly stood apart from each other and left an open space. When the crack, however, was filled with selvage, or clay, or broken pieces of country rock, etc., the waters containing the ore, which afterward found their way up through this crack, would deposit their solutions much more irregularly, running for a while on one side and then crossing to the other, hugging first one wall, then the other; and often, as above suggested, replacing some of the clay itself, or a portion of the country rock, giving rise to many of the common phenomena observed in the majority of veins. If, however, it is clear that a true fissure vein was dipping steeply when mineralized, it is more common to find rich ore in the hanging than on the foot wall, and that the replacement of the adjacent country rock in such a case has taken place on the upper side and not on the under side. Frequently, too, bodies of rich ore are found in the "hanging" country rock apparently disconnected from the vein, but nevertheless due to it as the principal channel through which the

mineralizing waters ascended; some of them finding their way through small tributary cracks or crevices into this hanging wall rock, dissolved out portions of it, and filled these with ore by the process of replacement already described. This is, of course, easily explained on the theory of hot waters endeavoring to escape in a general upward direction. Again, there are instances of valuable mines where the ore occurs in bodies roughly lenticular in shape, along some line of deep-reaching fracture. This fracture may or may not be roughly straight, but usually is so. The lens-shaped bodies of ore may occur at any place along it, and may be close together or far apart. In these, however, there is usually sufficient continuity of ore along the line of fracture to keep them within the class of true fissure veins or lodes.



Lenticular Ore Bodies, Section and Horizontal Plan (Phillips).

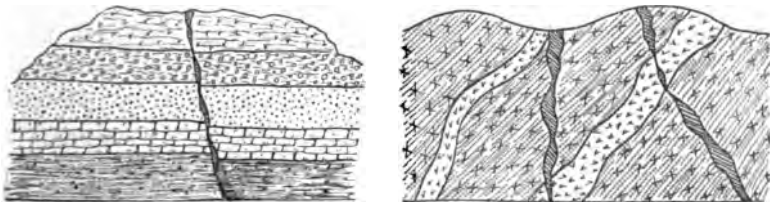
The formation of "horses" in the vein is usually due to the irregular course followed by these waters or to their irregular and incomplete action in replacing the country rock or triturated matter in the fissure, or sometimes to pieces of country rock having become dislodged and afterward sticking fast in the fissure. At other times these are due to the fact that the ascending mineralized waters found and followed some crack near the main fissure, but running off into the country rock and afterward returning to the main break.

The importance of the subject of replacement in nature of one or more minerals by other mineral matter cannot be overestimated, especially in the study of the subject of ore deposits. It has taken place to an inconceivable extent, and it appears that nearly all mineral substances can be replaced by some other mineral. The common example that appeals to unscientific men most strongly is perhaps that of the so-called "petrified" wood, where silica (quartz) has completely replaced the fibre of the wood; so that now we have a perfect tree trunk, which, instead

of being the original vegetable matter, is, as we have seen, nearly pure silica or quartz colored by iron or some other metal. *Exactly the same pseudomorphism has taken place to a greater or less degree in nearly all kinds of mineral deposits*, the mineral matter contained in solution having replaced or substituted portions of pre-existing rocks or other minerals. This has certainly occurred to a much greater extent than is now commonly believed.

Locality. — With regard to the position of fissure veins and other ore deposits, it must be remembered that they may be in any kind of rock, either eruptive or sedimentary, — *e. g.* granite, syenite, diorite, porphyry, limestone, slate, or sandstone, — or sometimes at the contact between these rocks. It is certain, however, that when the vein is found passing through certain kinds of rocks, — owing probably to their chemical composition and to other reasons which are not at all well understood, — these rocks *have in themselves* exerted a favorable influence upon the deposition of valuable mineral solutions, while other rocks have exerted an equally unfavorable influence. This is often very clearly shown where a nearly vertical vein passes through several dissimilar formations lying horizontally. In such a case the vein will often be found to be rich in one horizon, and poor in another. It has been suggested that currents of electricity have played an important part in ore deposition, and on this theory an attempt is made to explain this phenomenon. However, so little is at present known concerning the action of electricity with regard to ore deposition that it will not be referred to again.

As in the case of dikes, the nature of the rocks has little or nothing to do with the position of the veins which are found in them. One has only to remember that veins may occur in any region whatever, — that is, whether composed of sedimentary or eruptive rocks, which have been subjected in the first place to the causes (volcanic or otherwise) which have produced faults or



Fissure Veins transecting Stratified and Eruptive Rocks.

cracks in the earth's crust, and secondly to the agencies which have caused these fractures or breaks to be filled more or less continuously with the ores of the valuable minerals.¹

Longitudinal Extent. — The extent of veins across the country is so indefinite that it would be folly to make any statement with regard to it here. Sometimes a vein runs for a number of miles; other times it seems to be impossible to follow it but a short distance; but no thoroughly trained man can ever mistake a true fissure vein for anything else. *There is always such a continuity of the original crack and of the so-called "secondary" mineral matter — that is, mineral matter which was certainly deposited after the break occurred by the hot waters and vapors which have come up through the fissure —* that it presents in the great majority of cases an unmistakable and characteristic appearance. This continuity on the strike and dip of the vein can usually be shown to exist, — unless, of course, the vein after its formation has been subjected to faulting, as already described.²

Generally speaking, it would seem to the author that an ore body, to be regarded in the eye of the law as a "lode," and which will be given all the legal attributes which belong to true lodes, must not only possess reasonable continuity, but must *in itself represent some well defined and reasonably regular main channel of mineralization*, through which the hot waters and vapors ascended and in which or along which they deposited their mineral solutions. This is an almost infallible test. Thus a "pipe" of ore, representing presumably an old geyser vent and having but little lateral extent, though having great depth, would fall within the classification of true lodes, and the owner of the apex of such a deposit would be entitled to follow it outside of his boundary lines. On the other hand a mineralized "shoot" or "run of ore," which in itself does not represent a principal channel of mineralization, cannot be regarded in a mining, geological or legal sense as a true lode. Many terminable spurs and irregular bodies of ore often extending but short distances, which may, however, be connected with such main channels of mineralization, are thus excluded from the classification of lodes and "the law of the apex" cannot apply to them. These must, there-

¹ With regard to the causes which have produced these deep reaching fissures see p. lx.

² For the explanation of the terms "strike" and "dip" of a vein see Chap. XV., Div. I., A, p. 441, *post*.

ture, fall within the classification which will be treated of under the title "Unstratified Mineral Deposits which are Irregular," and the same rules of law which are applicable to this class will be applicable to them.

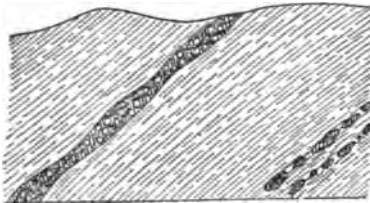
(h.) *Contact Deposits which are so Continuous as to be regarded as Lodes.*

It is now necessary to speak of an intermediate class of deposits which do not lie in real fissures and in a sense are perhaps not true lodes, but which in their general characteristics are so like them that they are so regarded in a legal sense. These are what are generally known as *Contact deposits*. They are usually found between or very close to the junction between two different formations or kinds of rock. There are examples of a contact deposit between sedimentary strata where the so-called vein or lode adheres closely to the line dividing two strata,—for instance, two beds of limestone. Nothing is more unlikely than that these deposits were formed by sedimentary action at the time when the limestone was formed; on the contrary, it is practically certain that the mineralized waters ascended, as in the case of veins, from some inferior region along this line of contact, finding in it a convenient pathway of escape, and deposited along it their load of mineral matter.¹ In so doing they probably replaced very considerable portions of the limestone, the time of mineralization having been subsequent to the consolidation and tilting of the limestone and the adjacent rocks. Now this deposit is so *continuous* and hugs this contact so closely that it as a whole can be regarded as a lode deposit. If, however, the ore or mineral matter should be discontinuous, and the limestones should be found to frequently lie one upon the other, with no intervening mineralized matter or break, it should not, in the opinion of the author, be properly regarded as a lode (although it would still be a contact deposit), and what is known as the "law of the apex" should not rule.

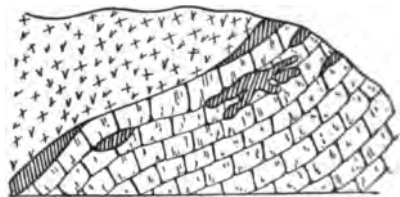
Another familiar case—although it is not on government land—is the famous deposits of copper in a conglomerate bed in Michigan. It would seem that these generally should be regarded as lode deposits, although the copper is found in what was originally nothing more or less than an old bed of pebbles now

¹ Very often a fault produces a so-called contact deposit.

cemented together, or conglomerate bed. This bed is now tilted to an angle of about forty degrees, and has been greatly metamorphosed by the heat of the adjacent eruptive rocks. It is practically certain, however, that this copper was not deposited at the time this was an unconsolidated pebble deposit, but that it got into the stratum subsequently, and probably after the rocks had been tilted. The hot mineralized waters found in this a most convenient place for their ascent, and one which was favorable for the deposition of the mineral matter which they carried.



Occurrence of Copper in Michigan in Conglomerate and Amygdaloidal Belt.



Occurrence of Copper and other ores along Contact between Limestone and Eruptive Rock.

As to how nearly the characteristics of such a deposit must approach a true fissure or vein deposit in order to be considered as such from a legal point of view is very difficult to say; but it may be said in a general way that they must always present the *characteristic of continuity of ore or subsequently deposited mineral matter*. This ore need not be rich, and indeed may be very poor, and the deposit for a long distance may be practically barren; but some subsequently deposited mineral or minerals must be proved to exist *very continuously* between the adjacent rocks before such a deposit can be classed in a mining or legal sense as a lode, and it is again suggested that the deposit must in itself represent some well defined old channel of mineralization through which the waters and vapors ascended with their load of mineral matter from the source from which they obtained it. The formations must not lie tight together and undisturbed upon each other for considerable distances; for this feature alone would be sufficient to bring the deposit within the class which will be next described.

Again, there are some contact deposits next to eruptive rocks which are very difficult to classify, both in a mining and legal sense. For instance, a dike has come up through some pre-existing rock, and the ore has been subsequently deposited along

the side of this dike or in the country rock close to it. It is always perfectly easy to follow along the wall of this dike, and one is rewarded by finding from time to time bunches of ore which in some cases are very rich. The dike may be only small, a foot or a few feet in thickness, or it may be perhaps a hundred feet in thickness. Now, if it can be shown that the dike itself is mineralized more or less continuously, although it may not in itself be pay ore, it would seem that such a deposit can be located as a lode or fissure vein deposit; and it is generally true that such deposits are so located, although it by no means follows that all such deposits should be regarded as true lodes. It is possible, however, in many cases to prove continuity, in that the dike itself frequently carries a small amount of mineral, or it is easy to find between the dike and the adjoining country a little stringer or thin deposit of ore, worthless in itself, but valuable in showing the continuity of the deposit. Often a vein (true fissure) will follow along a line of weakness produced by a pre-existing dike for some distance, then break away from it. This would be distinctly of the former class, and is not now referred to.

At other places there may be a large and very continuous body of ore following across country the contact of some eruptive rock—for instance, granite and porphyry—and some other rock, eruptive or sedimentary,—for instance, limestone. This ore may owe its origin in the first place to the eruption of the granite through the limestone, and afterward to the passage of mineralized waters between the contact of the eruptive and the sedimentary rock, along which contact they have ascended. These waters may have leached out great quantities of both rocks, but especially of the rock which would yield most readily to such influences,—as, for example, in this case of limestone,—and have deposited in its place, for long distances next to this contact, huge bodies of ore or mineralized matter. Such deposits could not be regarded in any other light than as a lode or vein, though having an origin in many features geologically different from it. In order to be so regarded, the simple rule with regard to deposits of this class is, *that they must always show a very decided continuity of ore or mineral matter deposited subsequently to the intrusion of the eruptive through the pre-existing and overlying rocks.* Or in cases where there are no dikes or irregular intrusions of eruptive material, and the ore is found occupying a position between two

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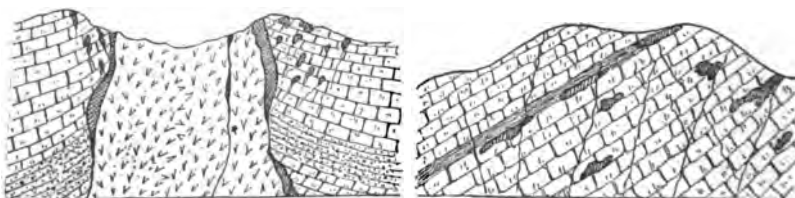


Common Examples of Contact Deposits.

dissimilar formations, *these must be very continuously divided by such ore or subsequently deposited mineral matter before the deposit or contact can be called in a legal sense a lode or a vein, and possess the legal attributes of such.*

From what has been said, it is clear that all contact deposits cannot be regarded as lodes. In fact, a very large number of valuable mineral deposits should certainly not be so regarded, simply because of the marked lack of continuity of mineral matter which has been deposited subsequently to the formation of adjacent rocks. This class will be treated of in the next division.

There are other classes of ore deposits which deserve reference in passing; that is to say, those which are found in or around some neck of volcanic material which has welled up from below through any kind of rock composing the hard so-called "crust" at that particular locality. These may be regular or irregular contact deposits around the edge, or the central eruptive mass itself may have been shattered by volcanic forces, and true fissure veins thus established in it. These fissures in some cases may have been subsequently filled with dikes of other eruptive material, or in others with the solutions from hot waters ascending through them, and forming deposits of the valuable ores. These deposits usually give no trouble, and should be properly classified in the great majority of cases without difficulty.



Contact deposits around Volcanic Neck.

Contact deposits in Limestone underneath stratum of Shale — also isolated bunches of Ore in the Limestone.

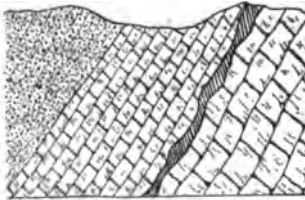
Another and quite rare class of deposits is where the hot waters have ascended through some more or less round or funnel-like opening somewhat after the manner of a geyser, and have filled this original vent with valuable ore. These more or less round chimneys of ore are rare, and in the great majority of cases can be proved to be only rich shoots of ore in an original crack or zone of fissuring having a more or less definite strike or trend across the country. In very few cases it is claimed that this is not the case, and that the ore deposit seems to be the filling of an ancient geyser vent, and that the deposit therefore, so far as it has been worked, represents actually an irregularly round chimney, having very little more extension in one direction than in another laterally, but being very continuous as it is worked downward, except perhaps where it may have been displaced by faults. This feature of regular continuity downward would, it is believed, be sufficient to bring this unusual class of deposit within the requirements of continuity which is so necessary in establishing what should be legally regarded as a lode, and what should not be so regarded. Some courts have, however, contended with much force that a deposit of valuable minerals should have, to a reasonable degree, *both lateral and downward* continuity to fall within the classification of true lodes, and to be located as such.

B. UNSTRATIFIED MINERAL DEPOSITS WHICH ARE IRREGULAR.

Irregular unstratified deposits are those which, owing to their irregularity of occurrence, lack of continuity, and general pocketiness or "bunchy" nature, cannot be regarded as lodes either in a geological, mining, or legal sense. They are not stratified deposits, nor are they vein deposits, nor are they the continuous contact deposits of the nature mentioned in the last division. Legally they are the most perplexing of all of our mineral deposits, especially when it becomes a matter of serious importance, as is very often the case, to properly classify them.

Any one familiar with mining law appreciates the vast importance of being able to put these deposits in their proper class; that is to say, being able to determine whether they may be properly located as *lode claims* or as *placer claims*. As has been intimated heretofore, and as will be more fully described hereafter, the law relating to these two kinds of claims is in many particulars practically opposed; and one cannot be too careful to know

at the outset the nature of any mineral deposit which he may be working, or concerning which he may be asked to give advice.



Contact Deposit or Vein Deposit
between two Beds of Limestone.



Section of Comstock Lode (Phillips).

Of course when these deposits are upon other than government lands, or upon such lands where statutes grouping all classes of mineral deposits, irrespective of their geological differences, are in operation, their proper classification is of no legal importance. On the other hand, whenever they are situated in the larger portion of the western United States, it becomes of the utmost importance to recognize them, and accord them their proper place in the classification which the author has outlined and endeavored to make clear.

(a.) *Irregular Contact and other Deposits of Indefinite Shape and Continuity.*

The chief characteristic of this class of deposits is their so-called pockety nature. By this is meant the lack of continuity of ore or of the subsequently deposited mineral matter which contains it. They must always show the reverse of that continuity of mineralized matter which we have seen is so important in the two former classes. We have also seen that this mineral matter or gangue must have been deposited subsequently to the formation and consolidation of the rock in which it is found, and into which it must have worked its way owing to the operation of the agencies which have produced most of the deposits of valuable metals.

It is important always to remember, and especially here, that in the case of all deposits of metalliferous ores which have been described under the general head of "Unstratified Mineral Deposits," *the ore is a stranger to the rocks in which it is found, and does not properly belong there, and must not be considered*

as a part of the country rock. This is a simple distinction, but should never be forgotten. Generally speaking, a metalliferous deposit, the nature of which is very unreliable and pockety, and which shows a marked lack of continuity with respect to the ore and to the subsequently deposited mineral matter carrying it, should not be regarded as a lode or vein deposit, and should not be so located. It is therefore clear that they should only be located wherever the United States statutes are in operation, as *placer claims*.

As has been said, the deposits of ore of this class must be so irregular in shape, so discontinuous in nature, and *so separate one from the other*, as to be generally known by the mining term "pockety." Perhaps it would be better to describe them as irregular and isolated bunches or nests of ore.

These occur scattered through some particular stratum of rock, or following along some line of contact like the former class. Sometimes they spread out irregularly along lines of stratification, especially in the case of a limestone rock forming what are known among the lead miners as "flats." These have certainly been produced by the replacement of a portion of the original rock by the ore which has found its way into it. No matter where found, the origin of these deposits presents, generally speaking, very little more difficulty than the lode or vein deposits which have been described. They have been due in the majority of cases *to the same agencies, acting, however, much more irregularly*, and for local reasons which can in many cases be easily determined. As in the former class of deposits, the mineral-laden waters came from unknown depths with their load of mineral matter in solution. Being hot and under great pressure, they of course endeavored to find an outlet upward. These outlets were usually found through the cracks and joints in the rocks. Wherever the conditions were suitable — and what these were is not at all well understood, except in a general way — and especially where these waters were *checked or retarded* in their upward progress, it is found that they would deposit their load of mineral matter, often dissolving out portions of the rock through which they passed in order to do so, effecting the process of replacement already described. Thus, there is often seen, as in the zinc regions of Missouri or the Rocky Mountains, masses of the original country rock which have escaped replacement, entirely surrounded by deposits of this kind.



Irregular Occurrence of Lead Ore in Limestone.



Deposits of Ore along the sides of a Dike (Whitney).

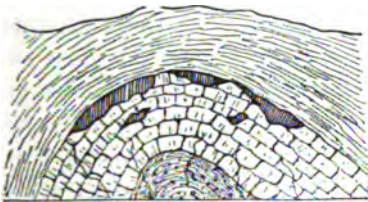
It is often found that these waters have been checked in their progress by some impervious stratum which is generally silicious or otherwise insoluble in character, rather than calcareous or otherwise soluble. Where the strata are lying more or less horizontal, that is, one upon the other, we find that many valuable mineral deposits were formed in scattered bunches or nests immediately underneath such a stratum, the chemical and physical conditions not being favorable to the further ascent of the mineral-laden waters. This simply means that as these waters came up from whatever inferior sources from which they may have obtained their load of mineral matter, they abutted against this stratum, and failing to go through it, or being checked in their further upward progress, they were forced to deposit their mineral matter at this point. Therefore one can follow along or underneath this contact—as in the case of a stratum of shale resting on limestone, or often porphyry resting on limestone—for a long distance, and find that the formations rest tightly one upon the other, with the contact well defined, but marked by no intervening ore or other mineral matter deposited at the same time with the ore. Then suddenly he will come into a large pocket or absolutely isolated body of ore which has usually spread out underneath the overlying silicious stratum, mushroom-like, although the waters producing it may have come up through the little joints, cracks, or seams in the rock immediately underlying the isolated deposit. By following the so-called “contact” he may find a number of such isolated and disconnected deposits. Or sometimes cases are met with, especially if these formations have been tilted, where the mineralized waters, when reaching this contact, have chosen it as the easiest path of escape, and worked their way up through it or along

it very irregularly, being always prevented from ascending vertically by the insoluble stratum above. In this way they have left untouched and unaltered some portions of the contact while they have deposited their solutions at others, giving rise to very irregular and apparently unconnected deposits.

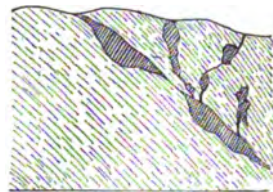


Diagram showing how Ore has collected Underneath Porphyry in the Upper part of a bed of Limestone (Emmons).

Again, sometimes valuable deposits of ore are found irregularly distributed along or near the top of anticlinal folds in stratified rocks, where these folds exist in regions, which have not only been subjected to enormous pressure causing the folds, but which have been shattered and penetrated by deep-reaching fissures. The reason is obvious, for, from the foregoing, it is readily seen that they are apt to occur there, if the other conditions are favorable; namely, solubility of an underlying and imperviousness of an overlying stratum, which are affected by the other causes productive of ore deposition. There is a striking physical similarity in the reasons, which have caused these deposits to be formed in such places, and those which have caused oil and natural gas to collect along the crests of anticlinals. (See page lxxiv.)



Deposit of Ore in the Crest of an Anticlinal Fold.



Irregular Deposits along a line of Fracture, with Offshoots.

Now these deposits are manifestly different from those which have been described, and should not be confounded with them, although this is frequently done. Naturally it is to the interest of the one owning a claim upon the outcrop of a contact between these two formations—that is, controlling its apex—to have it

regarded as a vein or lode deposit, since by following the contact downward for a long distance he is quite certain to come into a number of these pockets of ore, *although he may have no other guide than the contact itself*. But it is manifestly improper that he should have this right where the deposits of ore are in themselves discontinuous in nature, and the formations are often found resting tightly upon each other with no intervening mineral matter. Of course the element of reasonableness must enter into all of these statements, but what has been said is applicable generally in all cases, and accurately in the great majority.

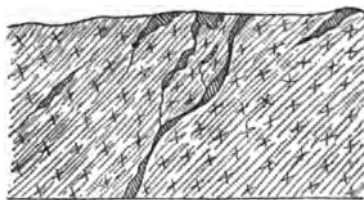
(b.) *Irregular Pockets in Limestone or other Soluble Rock.*

More or less similar to the foregoing are the deposits which are so frequently seen and abundantly worked; namely, irregular but often large masses or bunches of ore in any kind of rock, usually in limestone. It should be said that limestone, of all other rocks, furnishes the most perfect conditions for the formation of this class of indefinite, pockety deposits, for the simple reason that owing to its calcareous nature it offers little resistance to the dissolving influences of hot mineral-laden waters. Some eruptives, as has been pointed out, have the same characteristic, but not to the same degree. Limestone is also supposed to have exerted a beneficial influence upon the deposition of certain solutions contained in these waters, causing them to drop their previous load of mineral matter when taking the limestone into solution. Many of the lead and zinc deposits of the Mississippi Valley are of this description, and one who is familiar with these deposits in Kansas and Missouri cannot have a better type of the class which is now being described. These deposits are extremely irregular in shape and of varying size, but are often connected by one or more little stringers of ore, marking the path followed by the waters which deposited the ore in its present position. Frequently they are entirely disconnected and scattered over a wide area; but so far as it is possible to judge of any geological phenomenon, *it is certain that they were not deposited in the limestone bed when it was formed*. On the contrary, they were deposited in their present position, having derived their mineral matter from some inferior source, long after the formation and consolidation of the limestone. It can be shown, however, that this usually occurred where the limestone shows evidence of having been pre-

viously broken or shattered to a greater or less extent, the cracks having permitted the ascent of the mineral-laden waters; and the same may be said of the next class of deposits. In some cases it is not improbable that some original overlying insoluble stratum may have assisted in the formation, as in the last class mentioned, of these bodies of ore, though at the place where these deposits are worked it is now absent, having been carried off by erosion.



Irregular and Isolated Pockets of Ore in shattered Limestone.



Fissure Vein and Irregular Offshoots and Pockets in a Soluble Eruptive rock.

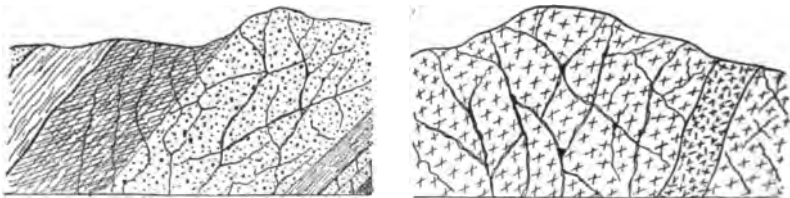
In this class of deposits, as in the former, there is always such a marked lack of continuity of ore or of secondarily deposited mineral matter that it is clear that they should not be regarded as lodes, and therefore should not be located as such, but as placers, when found upon government lands. Some valuable deposits of this class are worked for the silver they contain in the western and southwestern portions of the United States. Therefore, if the author is right in the above construction, it becomes of very considerable importance to recognize and to properly classify them.

(c.) *Stockwork.*

The deposits known by this name are simply a network of small veins, crossing each other at all angles, and being always found in a rock which has certainly been very much shattered and broken before the mineral matter found its way to its present position. Sometimes this extends over very considerable portions of the rock in question, or it may extend into the adjacent rocks. Such a condition is quite frequently met with in connection with the two previous classes, but usually it is distinct from them. Their origin is much the same, for the ascending metalliferous waters have simply travelled along these lines of fracture and

deposited their solutions wherever the conditions were favorable. Often gold, tin, and platinum, but other metals as well, are found in deposits of this description. These cracks are also often filled with material derived from the adjacent rock, such as quartz, calcite, feldspar, or asbestos (in serpentine), etc., according to the chemical nature of these rocks, by a process of leaching and segregation.

Deposits of this class are extremely unreliable and pockety, and while in one sense continuous, in another are just the reverse, because no particular seam can be followed for any distance. For instance, one crack or seam will soon give place to another traversing it, and so on *ad infinitum*. A whole stratum, or more frequently certain disconnected, isolated portions of a stratum, such, for instance, as quartzite, is frequently found containing great numbers of these little seams traversing it in every direction, the majority of which contain more or less ore or mineral matter accompanying it, and deposited with it through the same agencies. Now it would be manifestly improper to call this kind of deposit a vein or lode, unless, indeed, the stratum of rock containing these seams should be *reasonably thin and continuously mineralized for a considerable distance*, and be thus made to possess the chief distinguishing features of a true lode. It would also be improper to call it a regular or irregular contact deposit; so, necessarily, when ore is found to occur in this way it should be regarded as a type of deposit different from any of the foregoing.



Stockwork Deposits or Deposits of Ore in the Joints and Seams of a highly shattered rock.

In the great majority of cases, from what has been said, it is clear that such stockwork deposits, when they are very irregularly scattered through the general mass of the rock forming the stratum or strata, cannot properly be located as vein or lode deposits; nor can the whole stratum in this case be so located, but

they should be located when upon government lands as placer deposits, for much the same reasons as the decidedly isolated, irregular, discontinuous, and pockety deposits heretofore described should be so located.

To enable any deposit of valuable ores or other mineral substances to be located as a lode claim, or, more accurately, to possess all the legal attributes of a true lode, there must always, in the opinion of the author, be shown to exist *a reasonable continuity of ore*, or the accompanying mineral matter (gangue) presumably formed at the same time and by much the same agencies as the ore, both occupying, as has been seen, some reasonably well defined main channel of mineralization, or there should at least be, in the judgment of trained and educated mining men of practical experience, a reasonable expectation of such continuity of ore. If this continuity and regularity cannot be shown to exist, and the expectation of it can be shown to be unreasonable, the deposit, in his opinion, should be located as a placer claim, and the laws governing this class of claims should apply.

D. M. BARRINGER.

PHILADELPHIA, September, 1897.

The following is a legal, but not a geological or mineralogical, classification : —

I. STRATIFIED MINERAL DEPOSITS.

A. REGULAR.

(a.) *Non-metallic.*

Coal, fire clay, asphalt, salt, gypsum, alum, potash, graphite, infusorial earth, quarries of stratified rocks, Chile nitrate, etc.

(b.) *Metallic.*

Iron, manganese, aluminum, gold, tin, and platinum gravels.

B. IRREGULAR.

(a.) *Non-metallic.*

Asphalt, petroleum, natural gas, alum, bauxite, borax, potash, phosphate rock, guano, quarries of rocks not sedimentary, mineral paints, sulphur, etc.

(b.) *Metallic.*

Iron, manganese, aluminum.

Should be properly located when on government lands according to statutes governing the particular kind of deposit; or generally, in the absence of such, or when not found in true fissure veins or as regular contact deposits, as *Placer Claims*, and the law governing this class of deposits should apply.

II. UNSTRATIFIED MINERAL DEPOSITS.

A. REGULAR.

(a.) *Fissure Veins or True Lodes.*
(See page ciii.)

(b.) *Regular or Continuous Contact Deposits.* (See page cxi.)

Should be located as *Lode Claims*, and the law governing this class of deposits should apply.

B. IRREGULAR.

(a.) *Discontinuous Contact Deposits.*
(See page cxvi.)

(b.) *Isolated Deposits in Limestone, etc., also Terminable Spurs or Off-shoots from Lodes.* (See pages cx and cxx.)

(c.) *Stockwork (possible exceptions).*
(See page cxxi.)

Should be located as *Placer Claims*, and the law governing this class of deposits should apply.

The above classification, for the sake of clearness, has been carried out a little further than appears in the text.

A LIST OF THE MORE IMPORTANT MINERALS AND METALS WHICH
POSSESS COMMERCIAL VALUE.

Non-metallic.

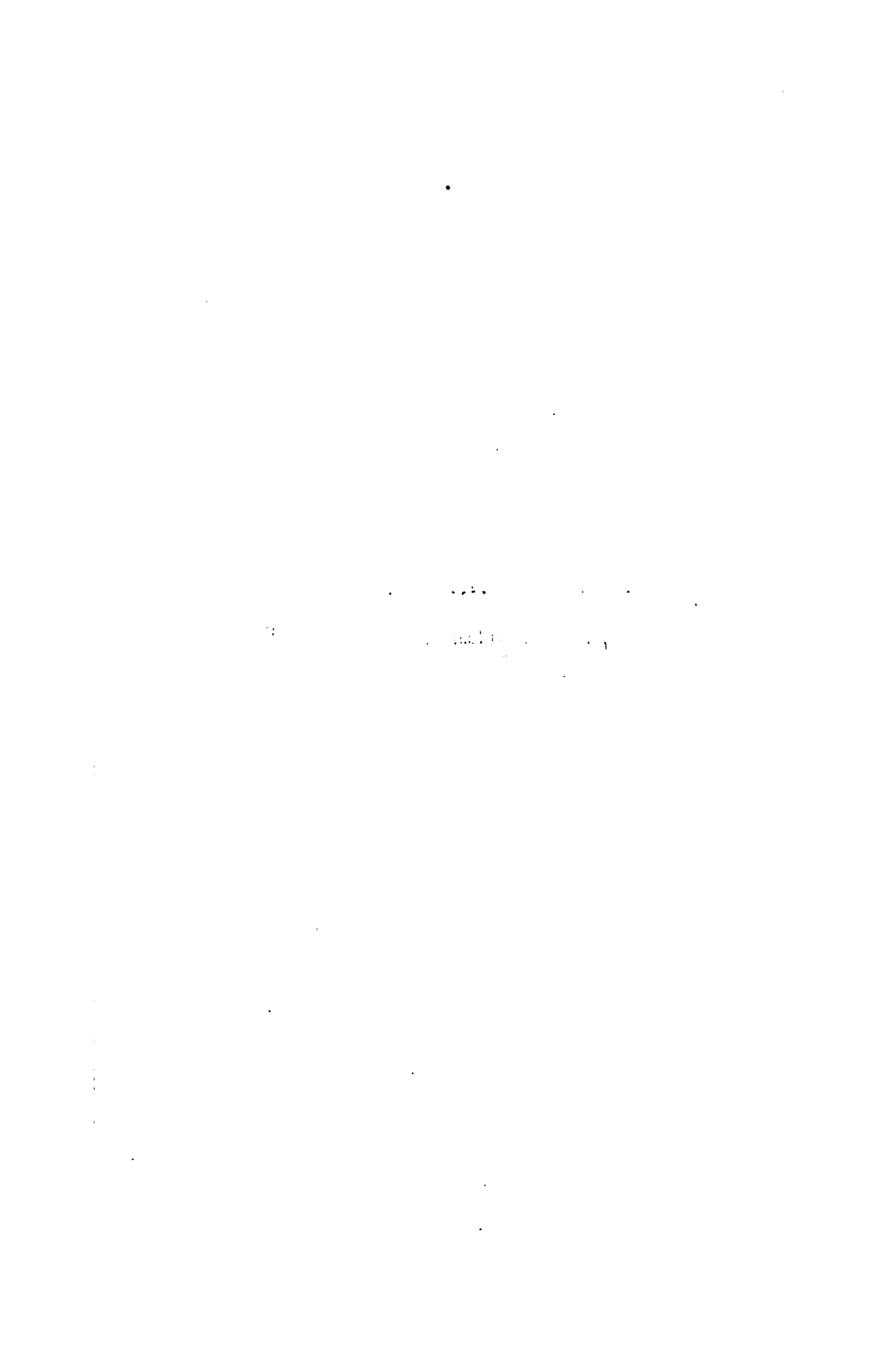
Alum.	Iodine.
Anthracite Coal.	Lignite Coal.
Asbestos.	Limestone.
Asphalt.	Magnesite or Dolomite.
Barytes.	Marls.
Bauxite.	Mica.
Bituminous Coal.	Mineral Paints.
Borax.	Mineral Waters.
Bromine.	Monazite.
Building Stone.	Natural Gas.
Calc-spar.	Nitrate of Soda.
Cement.	Ozocerite.
Chromic Iron Ore.	Petroleum.
Clay Deposits (Fire Clay, Brick Clay, etc.).	Phosphate Rock.
Coal.	Potash.
Corundum (Emery).	Precious Stones.
Feldspar.	Pyrites.
Flint.	Rutile.
Fuller's Earth.	Salt.
Fluor-spar.	Silica or Quartz.
Graphite.	Soapstone.
Gypsum.	Sulphur.
Infusorial Earth.	Talc.

Metallic.

Aluminum.	Lead.
Antimony.	Manganese.
Arsenic.	Mercury.
Bismuth.	Nickel.
Chromium.	Platinum.
Cobalt.	Silver.
Copper.	Tin.
Gold.	Tungsten.
Iron.	Zinc.

**THE LAW OF MINES AND MINING
IN THE UNITED STATES**

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THE
LAW OF MINES AND MINING
IN THE UNITED STATES.

CHAPTER I.

PROPERTY IN MINERALS WHERE THERE HAS BEEN NO DIVISION BETWEEN THE OWNERSHIP OF THE SURFACE AND THE MINERAL ESTATE.

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| <p>I. Property and Rights of the Owner of the Soil in Minerals which are in Place.</p> <p>II. Property in Minerals which have been severed from the Freehold.</p> <p>III. Property and Rights in the Minerals of Owners of the Soil who have a Limited Estate.</p> <p>A. Tenants for Life.</p> | <p>B. Tenants for Years.</p> <p>C. Owners of Equities of Redemption.</p> <p>IV. Property and Rights in the Minerals where there are Joint Owners of the Soil.</p> <p>V. Property and Rights in Mineral Oil and Natural Gas.</p> |
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THE maxim of the common law is *cujus est solum ejus est usque ad cælum*, and by the common law the owner of the soil has the property in the minerals lying under it, and between planes passing through the centre of the earth and the boundaries of the surface. While in place and unworked, minerals are part of the freehold, and, as such, real estate. When separated from the freehold they become personalty. Minerals in the ground are, however, capable of severance or separation in ownership from the soil, and when so severed are independently and separately inheritable and capable of conveyance. This subject of property in minerals when they are of a different estate from the soil will be discussed in the next chapter. The present chapter treats only of minerals in land in which there has been no division of the estate, whereby the title to the minerals either beneath or on the surface has become vested in some one who is not the owner of the soil.

I. PROPERTY AND RIGHTS OF THE OWNER OF THE SOIL IN MINERALS WHICH ARE IN PLACE.

Minerals *in place*, or undisturbed in the position where they have been deposited by the agencies of nature, are a part of the land and belong to the owner of the soil.¹

Massachusetts. *Adam v. Briggs Iron Co.*, 7 Cush. 361 (1851). "*Prima facie* the owner of freehold lands is entitled to all the minerals and strata of coal, clay, or ore, lime, marble, and the like, not as a separate estate, but as a part of the fee and inheritance, and they will pass by descent or by conveyance without special designation."

New York. *Lacustrine Fertilizer Co. v. Lake Guano and Fertilizer Co.*, 82, 476 (1880). The agents of the State, in digging a canal through certain land, dug up and deposited in piles on the banks, certain marl. This was, both after and before the digging, a part of the freehold and the property of the owner in fee. (See p. 6.)

Pennsylvania. *Duff's Ap.*, 21 W. N. C. 491 (1888). The owner of a tract of land has the right to remove and convert into money for his own use the timber growing upon the surface and the minerals underlying it.

Vermont. *Stratton v. Lyon*, 53, 641 (1881). General possession of the surface of the close in which a clay pit is situated would include the surface of the clay pit; and whoever is in possession of the surface of the soil is in law deemed to be in possession of all that lies underneath the surface.

¹ The expression "in place" (*in situ*) has reference to the condition of the mineral deposit when it forms a part of the solid rocky crust of the earth, and occupies the position therein where it was placed ages ago by the operation of natural agencies. Thus the expression is often used of a ledge, lode, or vein, or any description of ore body; while, on the other hand, fragments which have become detached from these, and which have most commonly rolled or have been carried by other natural agencies some distance from their source, are referred to as "float." Thus the gold in a placer claim, which is usually a gravel deposit, admixed with other detrital material, in an old or present river bed, is not strictly in place, though it is true that it has been deposited in this manner by the forces of

nature; namely, by the decay and erosion or washing down of the rocks containing the gold-bearing veins. The veins or lodes, however, from which these fragmental particles were derived, when found forming a part of the solid rocky mass which underlies all soil, are properly said to be *in place*. So also the term is properly applied to strata of coal, limestone, iron ore, etc., which belong to the owner of the soil when there has been no severance of the estates. But as is seen from the statement in the text, the owner of the soil is entitled to all valuable mineral substances which have been deposited upon his land *through the agency of natural forces alone*, although they may be mere float, and their original source may have been outside the limits of his property.

II. PROPERTY IN MINERALS WHICH HAVE BEEN SEVERED FROM THE FREEHOLD.

Upon severance from the earth, minerals *become personal property*, and are dealt with by the law as personalty. This severance must be accomplished by artificial means, the object of which is to separate the minerals, and must not be the mere result of natural causes. In the latter case, as we have seen, the minerals still remain a part of the freehold. So also do they when the severance is the incidental result of excavation for a purpose entirely distinct from the extraction of minerals, when they are allowed to remain mixed with the mass of the soil.

Mineral, when unextracted, being part of the realty, the taking of mineral from the land of another is not larceny but merely a trespass, where the taking and carrying away are so closely connected as to constitute one and the same continuous act. But where after the severance the mineral is left upon the property of its owner, however short a time, before it is carried away, or if another well-defined act intervenes between the severance and the asportation, the latter is not to be considered as a continuation of the trespass, but, if the act is done *animo furandi*, is larceny.¹

United States. *Forbes v. Gracey*, 94, 762 (1876). Although the title to mineral lands may remain in the United States, the ores, when dug or detached from the lands under a mining claim, are free from any lien, claim, or title of the United States, and, *becoming personal property*, the ownership of which is in the man whose labor, capital, and skill has discovered and developed the mine and extracted the ore or other mineral product, are, as such, subject to State taxation in like manner as other personal property.

California. *People v. Williams*, 35, 671 (1868). To sever gold-bearing quartz rock from the land of another and carry it away is not larceny but merely trespass. An indictment charging defendant with unlawfully and feloniously taking, stealing, and conveying away from the mining claim of B. forty-two pounds of gold-bearing quartz rock, the personal property of B., of the value of \$400, will not support a conviction of larceny.

New Jersey. *Lepore v. Mining Co.*, 3 N. J. L. J. 280 (1880), Cir. Ct. As between mortgagor and mortgagee ore taken out of the earth for the purpose of being removed and sold, and remaining on the premises, is personal property.

¹ See further on the subject of severance from the freehold, Chap. XIV., Div. IV., as to property in refuse; Chap. II., Diva. III. and IV., for title in minerals mined under incorporeal rights and licenses; and Chap. XXII., as to trespass and larceny.

New York. *Lacustrine Fertilizer Co. v. Lake Guano and Fertilizer Co.*, 82, 476 (1880). Marl which has been thrown upon the banks of a canal built by the State, having been dug out of its bed, is a part of the realty without regard to the question whether or not the State acquired title before cutting the canal.

The owner of land cannot, as a general rule, by agreement with another make that which is a part of the realty personal property, as against a subsequent purchaser for value with notice, there having been no actual severance made.

North Carolina. *State v. Burt*, 64, 619 (1870). A nugget of gold found upon a loose pile of rocks savors of the realty, and is not a subject of larceny. "Nuggets of gold are lumps of native metal, and are often found separated from the original veins; when this separation is produced by *natural causes*, there is no severance from the realty, but such nugget will pass under a conveyance like ores and minerals which are embedded in the earth. When ores and minerals are taken out of mines with expense, labor, and skill, to be converted into metals, or used for the purpose of trade and commerce, they become personal property, and are under the protection of the criminal law."

Brown v. Morris, 83, 251 (1880). A contract by which one made bricks on the land of another, the property in the bricks to remain in the owner of the soil until he had been paid for his clay and wood used in their manufacture, is not within the Statute of Frauds. The bricks were personalty, and the contract was concerning personalty.

Pennsylvania. *Watts v. Tibbals*, 6, 447 (1847). A. entered into contract with B., by which the latter was permitted to dig, raise, and remove stone from A.'s quarry for certain locks in a canal, the quantity to be ascertained by measurement in the locks, and payment to be made as soon as and as often as payments were made to the contractors on the canal. The stone having been quarried, and being at the mouth of the quarry, B. has a property in it; and having been levied upon and sold by the sheriff under an execution against B., the purchaser takes a good title.

Rhoades v. Patrick, 27, 323 (1856). It was set up as a defence to an action on a note given for stone quarried on land occupied by the plaintiff, and sold and delivered by her to the defendant, that the plaintiff did not own the land, and that as the title to the land was in question, the justice of the peace had no jurisdiction of the action. *Held*, that the stones were personal property when sold, and the title of plaintiff to the land was not in question.

Lyon v. Formley, 53, 261 (1866). Coal which has been purposely and lawfully severed from the freehold in the construction of a lateral railway under act of May 5, 1832, becomes at once personalty for which the owner of the land may maintain trover. (See this case under Chap. V., Div. IV.)

Green v. Ashland Iron Co., 62, 97 (1869). Plaintiffs under a mining lease raised iron ore which, being unwashed, and having earth clinging to it, was left on the bank to dry. This was the usual course of business in mining iron ore, and the landlord making no claim to retain the earth, replevin lay for the unwashed ore.

Lykens Valley Coal Co. v. Dock, 62, 232 (1869). Coal as soon as mined becomes personal property. The lessee of coal mines made an assignment for the benefit of creditors, after which the lessor re-entered. The assignee was entitled to coal *already mined lying in the mines, provided it could be removed without injury to the mine*; and he could maintain trover therefor.

Commonwealth v. Steimling, 156, 400 (1893). One who severs coal from the freehold, *animo furandi*, and after screening and loading it upon a boat on the owner's land carries it away, is guilty of larceny. The act of carrying away may be separated from the act of severance, and is not to be considered as one and the same continuous act,—a mere trespass.

Noble v. Sylvester, 42, 146 (1869). A stone split out Vermont. and removed from its original connection and position in the ledge, and laid up for the purpose and with the intention by the owner of the farm upon which it was quarried and left, of using it in the construction of a tomb elsewhere, would not pass by a deed of the farm. It would be governed by the same principles that are applicable to timber, fence rails, and the like, that were severed from the freehold. If intended for use on the farm, they pass by the deed in a sale of it; if to be used elsewhere, they do not pass.

As there was nothing about the stone or its position to indicate the use to which it was to be put, this was a proper subject of explanation between the seller and purchaser at the time the deed was executed, and such explanation, though accompanied by a former parol exception of the stone, which was unnecessary, might well be by parol. It was not error to admit proof of the parol exception.

III. PROPERTY AND RIGHTS IN THE MINERALS OF OWNERS OF THE SOIL WHO HAVE A LIMITED ESTATE.

A. *Tenants for Life.*

B. *Tenants for Years.*

C. *Owners of Equities of Redemption.*

Minerals are of such a nature that the enjoyment of the ownership of them consists in their consumption, or more accurately, in taking them away from the land, and to this extent devastating it. It follows that, while the owner of the estate in fee, as owner also of the minerals, may remove them and thus impoverish the land, those who hold an estate less than a fee in the land are subject to certain limitations created for the protection of the owners of the executory or reversionary estates. The general principle is that the produce of mines already opened and previously worked is considered to be temporary profits of the land, while all other minerals are an essential part of the land itself, whose extraction is waste.

A. *Tenants for Life.*

A tenant for life, however the tenancy may have been created, may work mines of all sorts which were already opened before the commencement of the tenancy; but it is waste for a tenant for life to open new mines.¹

The open mines he may work even to exhaustion. He may also sink new shafts or wells to the same vein, and it has been held in an early case in Virginia that he may penetrate through the seam already opened and dig into another below it. The mining, however, must not be carried on unskilfully so as to do injury to the inheritance. This right to work open mines carries with it the right to take from the land timber for use in the operations. A mine ceases to be an open mine when it has been abandoned before the commencement of the particular estate with an executed intention to devote the land to some other use, but mere cessation of work does not constitute abandonment. In order to constitute an open mine, the opening must be upon the land which is the subject of the estate. Openings upon the vein on adjoining land will not give the right of working it.

In Michigan, however, the general principle is not applied to a case of statutory dower where the land is of no value except for its minerals, and in such a case the widow is entitled to her share of the royalty of mines opened subsequently to her husband's death.

It follows from the general principle that when a life estate is created in lands which have been previously leased for mining purposes, the rent or royalty thereof belongs to the life tenant as income. Also where mineral lands are conveyed by will or deed to a trustee with power to lease the minerals (or what includes them, the real estate) and pay the income to the *cestui que trust* for life with a remainder over, the rent or royalty derived from such leasing is income which goes to the life tenant. The real ground of this is the intention of the testator or grantor, but the cases are brought into line with the foregoing principle by the fiction that the power to lease amounts to an opening of the mines by the testator or grantor.

¹ In *Hollinshead v. Allen*, 17 Pa. 275, it was said that the mining of a deposit of sand, though technically waste, would not work a forfeiture, while the contrary was said of the mining of coal and quarrying of stone in *Griffin v. Fellows*, 81½ Pa. 114. In any event the tenant committing such waste is liable to account to the reversioner.

United States. *Black v. Elkhorn Min. Co.*, 163, 445 (1896). A mere locator of a mining claim, owning only the possessory right conferred by the statute, has no such estate in the property as against the United States or its grantee, as that the right of dower can be predicated thereon by virtue of any State legislation. Locator having conveyed without the joinder of his wife to another who obtained patent, the wife was held to have no dower.

Illinois. *Lenfers v. Henke*, 73, 405 (1874). A widow may work mines on the land in which she has dower, that have been opened between her husband's death and the assignment of dower.

Priddy v. Griffith, 150, 560 (1894). Baker, J. "It is a well-established rule of law that the person occupying land as dower cannot commit waste upon such land, and that the opening of coal and other mines thereon amounts to waste. But it is equally well settled in this State that where mines are already opened upon land assigned as dower, the widow has a right to operate the same and receive the proceeds thereof. It is true in this case the mines have not been actually opened upon the land assigned as dower, but there being a valid subsisting contract, executed by the husband in his lifetime, under which the lessees may at any time open the mines, and by the terms of which one dollar per acre rent or royalty is to be paid annually to the lessor, his heirs or other legal representatives, who at the time shall be legally entitled to the life estate in, or fee simple title to the land, until the mines are opened and certain fixed royalties after the mines are opened and worked, it seems clear to us that in justice the widow is entitled to the rent or royalty after the assignment of her dower. Should the lessees open mines on the lands assigned as dower, as by the terms of the lease they may, without the consent of the widow, she certainly would be entitled to the royalty named in the lease. The act of opening the mine would, in such case, be practically the act of the husband, viz. authorized by him.

"Then, in contemplation of law, for the purposes of this case, the mine may be treated as already opened when the widow's right of dower attached." To rent or royalty accrued before the assignment she would not be entitled.

Indiana. *Hendrix v. McBeth*, 61, 478 (1878). The owner of coal lands having leased them for the purpose of mining the coal on royalty for twenty years, died, and his widow elected to take against his will. Held, she was entitled to one-third of the royalties received from the lease. Widow may work open mines on lands assigned her as dower.

Maine. *Moore v. Rollins*, 45, 493 (1858). A widow is entitled to dower in a lime quarry of which her husband died seized of an estate of inheritance, if the same had been opened and worked during coverture.

Maryland. *Franklin Coal Co. v. McMillan*, 49, 549 (1878). Where strangers have dug and carried away minerals from land in the possession of a life tenant, upon which no openings or mines had been made in the lifetime of the grantor, the remainder-men may maintain trespass therefor.

Massachusetts. *Billings v. Taylor*, 10 Pick. 460 (1830). This was a claim of dower in a slate quarry. It appeared that a tract of about four acres, lying together, contained the slate quarry,

about a quarter of an acre of which had been dug over. The stone lay partly above and the residue immediately under the surface, and in going down the quality improved. The practice had been to take a section of ten or twelve feet square, and go down to the usual depth, and then begin on the surface again. It was claimed that the widow was entitled to dower only in the part of the tract actually opened.

Shaw, C. J. "We think it would be too narrow a construction to say that no part of this quarry was opened except that a portion had been actually dug; but it must be considered that the whole, lying together as one tract, belonging to one estate, and wrought in the manner described, was opened, and, therefore, that the widow was entitled to dower in that as well as the other estate, of which her husband had been seized during the coverture."

Seager v. McCabe, 92, 186 (1892). S. died in 1883 and left a tract of forty acres valueless except for iron ore. Before his death he had conveyed eighty acres adjoining, reserving the mines and minerals. No mine had been opened on either tract. In 1888 leases were made of the mining rights by the guardians of S.'s children under leave of court. *Held*, S.'s widow was entitled to one-third of the royalty received.

"The strict rules of the common law of England respecting waste and the rights of tenants for life do not obtain here. . . . It is not use, but abuse, that is waste. Waste must be consumption, nor is consumption always waste. . . . Our statute respecting 'dower' defines it as the use for life of one-third of all the lands of which the husband was seized during the marriage relation. 'Dower' is defined by the English authorities as the provision which the law makes for a widow out of the lands or tenements of her husband for her support and the nurture of her children. Co. Litt. 30 b; 2 Bl. Com. 130. The rules applicable to a country where landed estates are large and diversified, where the laws of inheritance are exclusive, where the theory of dower is subsistence merely, and where there is a strong disposition to free estates from even that charge, do not obtain in a commonwealth like ours where estates are small and the policy of our laws is to distribute them with each generation, where dower is one of the positive institutions of the State, founded in policy, and the provision for the widow is a part of the law of distribution, and the aim of the statute is not subsistence alone but provision commensurate with the estate.

"In the present case the grant is by operation of the statute giving the use of all the lands of which the husband was seized. The grant must be held to include the use of these lands, irrespective of whether mines were opened upon them before or after the husband's death. The question here is not the impairment of one mode of enjoyment or source of profit to reach another. There is but one mode of enjoyment of the land in question, but one source of revenue or profit. The land is susceptible of but one use."

Rockwell v. Morgan, 2 Beas. Ch. 389 (1861). "The widow is entitled to dower in the clay banks as well as in any other part of the inheritance. Dower is assignable in mines, quarries, and in whatever is part of and appurtenant to the

land of which woman hath dower, and that whether it be assignable by metes and bounds or not.

"The only question that can arise will be in regard to the mode of assignment, whether by metes and bounds or by a share of the profits. That course will be adopted which will be most favorable to the widow, and which will most effectually secure the enjoyment of her right. There can be no difficulty in taking an account of the profit. It appears from the answer that the clay banks have been worked in connection with the farm, and the profits of the clay may be ascertained as well as of any other part of the property. Working banks is a mere mode of enjoyment."

Reed v. Reed, 16 Eq. 248 (1863). Tenants for life may work a sand pit which has been opened and used by the former owner. The principle is stated as applying to "mine, quarry, clay pit or sand pit."

Gaines v. Mining Co., 33 Eq. 603, reversing s. c. 32 Eq. 86 (1881). The life tenant has a right to mine for his own profit, where the owner of the fee in his lifetime opened mines, even though he may have discontinued work upon them for a long period of years. A mere cessation of work, for however long a period, will not defeat the life tenant's rights; but an abandonment for a day, with an *executed intention to devote the land to some other use*, will be fatal to those rights.

Coates v. Cheever, 1 Cowen, 460 (1823). If during the husband's lifetime mines are opened, dower in them is properly assignable. Otherwise, if not opened in his lifetime, the opening of mines by tenant by dower is waste. The admeasurers should take into consideration the value of mines so far as opened during the husband's life, and they may, in their discretion, assign the dower in land by metes and bounds containing mines or not, by directing separate alternate enjoyment of the whole for periods proportioned to shares of the parties, or by giving the widow part of the profits. But they must not take into account the portion of the mines opened since the death of the husband by his alienee, nor the improvements made therein by the said alienee.

Raynolds v. Hanna, 55 Fed. 783 (1893), C. C. E. D. Ohio. By the terms of a contract the first party "grants" to the second "the exclusive right, license, and permission to enter upon the mine and remove the coal" from described premises, together with surface and timber rights, in consideration whereof the second party agrees to mine coal, and to take out and pay a royalty on a certain minimum amount annually, and to continue until all the coal that could be practically mined had been so mined and paid for. Rights of inspection are given to the first party, and a right of forfeiture for non-payment of royalty, and of re-entry and possession. A right of forfeiture was also given for breach of other covenants, and the second party agreed to "make no sale, transfer, or assignment of its rights under the agreement, nor to sublet any portion of the demised premises, without the written consent of the first party, any such sale, etc., to be null and void."

This agreement was held to be "clearly, in its legal effect and meaning, a lease." Such a lease was made by executors under a

power conferred upon them by will. The money received therefrom was income, distributable as such, and not as a part of the *corpus* of the estate.

Where the chief, if not sole value of lands is for coal-mining purposes, and the only profit to be derived therefrom is by sale or lease of the coal, either of which the executor in his discretion has power to do, the fact that the coal mines were not opened in the life of the testator does not affect the authority of the executor to lease the same, so as to make the rental thereof income of the estate.

Hollinshead v. Allen, 17, 275 (1851). Rogers, J., Pennsylvania. at Nisi Prius, charged that if a tenant for life discovered and mined a deposit of sand, though technically waste, it would not work a forfeiture, and did not come within the operation of the Statute of Gloucester, but tenant for life must account to the tenant in fee for the profits.¹

Neel v. Neel, 19, 323 (1852). It is not waste for a tenant for life to work mines already opened on the land.

This rule applies to all tenants for life, however the tenancy may have been created, and to all sorts of mines. It seems that a court of equity cannot undertake to determine what is an unreasonable use of a mine by a tenant for life, or restrain the same. The tenant for life may also take timber from the land for use in his mining operations.

Irwin v. Covode, 24, 162 (1854). The working of open mines by a tenant for life or his alienee is not waste, either at common law or by statute. Nor is it waste to open a new drift to mines already open. The court by virtue of common-law powers might restrain unskilful mining and wanton injury to the inheritance, but not such proper mining as is subject to no other objection than its liability to exhaust the mine. It is possible that chancery would afford relief by account between tenant for life and remainder-man, but it is clear that estoppelment is not the remedy.

Lynn's Appeal, 31, 44 (1857). Tenant for life or his assignee has a right to work mines or quarries opened upon the land before the commencement of the life estate. To do so is not waste.

Westmoreland Co.'s Ap., 35, 344 (1877). It is not waste for a tenant for life to work open mines. When not precluded by restraining words, he may work them to exhaustion. The term "mine" when applied to coal is generally equivalent to a worked vein. And when opened, the tenant for life may pursue that vein to the boundaries of the tract. A tenant for life may not take coal from under the tract in which he has the life estate, when there has been no opening in that tract to the vein, by means of an opening made on other lands of the life tenant under which the same vein runs.

Eley's Ap., 103, 300 (1883). Testator divided his estate into ten parts, seven of which were bequeathed absolutely; the remaining three were left in trust for three children for life, with remainders over. The will authorized the executors to sell the real estate "or to lease the coal upon or under the same," provided the consent of the owners of six-tenths of the premises was first obtained. With such consent the executors leased all the coal for an indefinite period at a royalty.

¹ See *Griffin v. Fellow*, 81½ Pa. 114, p. 17.

The rents accruing from this lease were "income" within the meaning of the will, and as such payable to the life tenants. The power given to the executors, subject to the consent of the owners of six-tenths, gave the life tenants the same rights over unopened mines as if they had been opened and worked in testator's lifetime.

Wentz's Ap., 106, 801 (1884). Testator directed that his executors should "collect and pay all the income arising from my estate, both real and personal, to my wife during the period of her life," with remainder over. The executors were given power to sell certain real estate, which was only valuable as coal land, and directed to exercise their own judgment as to the propriety of leasing or selling said estate.

The executors leased the coal upon this land which had never been worked during the life of testator. This was held to be an exercise of the power of lease, and not that of sale, and the rental therefrom went to the life tenant as income.

McClintock v. Dana, 106, 886 (1884). A testatrix by her will devised her residuary estate to her executor in trust, to invest the personal estate and the proceeds of her real estate, and to apply so much of the "yearly proceeds or income" thereof as should be necessary for the support of her daughter during her minority, and to invest for accumulation whatever balance there might be of such income. Upon the majority of the daughter the whole income of the estate was to be paid to her during her life, and after her death the *corpus* of the estate was limited to her children. The executors had power both to lease and sell real estate, and in pursuance thereof "leased" certain coal land unopened, when the testatrix died, to lessees who were empowered to mine the coal until it was exhausted, paying therefor a certain royalty or rent. *Held*, that the rent or royalty thus received was payable by the trustees to the daughter as *cestui que trust* for life, as "income" of the estate within the meaning of the will.

Shoemaker's Ap., 106, 892 (1884). A testatrix by her will devised land to a trustee for the use and benefit of her grandson for life, and gave the trustee power to lease the land for coal and mining purposes. The trustee leased "all the coal and veins or strata of coal in, under, or upon" the land referred to "for such term as may be necessary and required to mine and remove all the workable coal in and under said lands" for a specified annual rent or royalty.

Held, that the rent or royalty held by the trustee under this lease was income of the trust estate, and payable as such to the testatrix's grandson as tenant for life. A tenant for life when not expressly precluded may not only work open mines, but may work them to exhaustion.

Sayers v. Hoskinson, 110, 473 (1885). Mines and quarries open at the commencement of a life estate may be worked by the life tenant even to exhaustion. See *Fairchild v. Fairchild*, 9 Atl. Rep. 255 (1887), under Chap. III., Div. II. C.

Jones v. Strong, 5 Kulp, 7 (1888), Com. Pleas. Testator bequeathed half of her residuary estate to her daughter, and directed the investment of the rest for her use during life, and gave executors power "to sell and convert my estate into money, or to lease my coal interest,"

and to invest proceeds of coal lands so as to produce a permanent revenue, the income thereof to go to the daughter. After making his will he leased his coal interest on royalty. This royalty being part of his residuary estate, *held*, the daughter was entitled to one half, and the other half must be invested by executors for her use.

Bedford's Ap., 126, 117 (1889). A married woman, her husband joining, conveyed her lands, underlaid with coal, to trustees, "in trust to control, lease, demise, and to mine-let the said lands," and to collect and pay over and distribute the net income of said estate to the wife, with remainder over, etc. In such case the rents or royalties in the trustees' hands derived from a lease of coal in unopened mines executed in pursuance of the powers conferred by the deed were to be regarded as income, payable to the wife for life, and not as the *corpus* of the estate, to be held by the trustees under the trust.

Woodburn's Est., 138, 606 (1890). Testator, prior to his death, leased his farm for oil purposes, lessee to pay, *inter alia*, one-eighth of all oil produced. At time of testator's death there were three producing wells and another being drilled. The proceeds of oil run into pipes to the credit of lessor after testator's death, and sold by the executors, are income and go to life tenant. "The right of a life tenant to operate previously opened mines, and work the same even to exhaustion, cannot be questioned. *Eley's Ap.*, 103 Pa. 303, and cases there cited."

Blakley v. Marshall, 174, 425 (1896). Certain land was conveyed to B. and wife to hold to them for and during their life and no longer, and as trustees and in trust for their children, their heirs and assigns forever, subject to the life estate. Oil having been discovered upon neighboring lands, and the working thereof threatening to drain the oil from the land in question, they, as life tenants and trustees, leased the same for the purpose of operating and drilling for petroleum and gas for fifteen years, and so long thereafter as oil and gas may be produced in paying quantities. *Held*, they were not entitled to the royalties received from the lessee, but only to the interest thereon during their lives, and at the death of the survivor the *corpus* of the fund arising from the royalties went to the remainder-men.

Marshall v. Mellon, 179, 371 (1897). A life tenant of lands which have not before been operated for oil or gas, has no right to so operate, and cannot give such a right by lease. A life tenant who has leased the land for oil and gas purposes cannot recover rent from the lessee. In this case the lessee had not taken possession under the lease, or operated the land.

Clift v. Clift, 3 Pickle, 17 (1888). "Dower is assignable to the widow in mines, quarries, and the like, and she may enjoy the same, either by allotment by metes and bounds, or by a share of the rents and royalties, where the mines or quarries were opened and operated in the life of the husband, whether the same be operated by the husband or by lessees paying rent or royalty on the yield." In this case coal was being mined on royalty under a ninety years' lease made by the husband, and the widow was assigned one-third, the royalties to be held by her from the date of his death during her life, unless the mines should be exhausted sooner, in which

event she was to have for life one-third her husband's interest in the land covered by the leases.

Virginia. *Findlay v. Smith*, 6 Mumford, 134 (1818). The owner of land containing a salt well provided by will as follows: "During the life of my wife it is my intention and request that A. B. and her do carry on my business in partnership, both salt works and merchandising, each equal shares; and that in consideration of the use of my capital they pay out certain legacies." *Held*, the life tenants might sink a new well, or tap the same vein as that drained by the salt well, and they might work the same to exhaustion. They also had the right to unlimited use of wood for fuel to carry on said works from woodland of testator, which he had in his lifetime used for that purpose.

Crouch v. Puryear, 1 Rand, 258 (1822). It is not waste for tenant by dower to take coal to any extent from a mine already opened, or to sink new shafts into the same vein of coal. The tenants may even penetrate through a seam already opened and dig into a new seam that lies under the first.

West Virginia. *Williamson v. Jones*, 39, 231 (1894). See this case on p. 29.¹

Koen v. Bartlett, 41, 559 (1895). A tenant for life, when not precluded by restraining words, may not only work open mines, but may work them to exhaustion. A tenant for life or his grantees are entitled to the rents and royalties from an oil lease executed by the owner of the land before the beginning of the life estate.

B. Tenants for Years.

A tenant for years, in the absence of provision in the lease showing a contrary intention, may work open mines, but may not open new ones.²

This right may be taken away by express provision in the lease, or by implication from the fact that the land was leased for a purpose *other than that of mining*. Of course when the privileges given by the lease impliedly carry with them the power to mine, the restriction to open mines is removed, and the tenant may open mines and work them. This is a common form of mining lease, which will be treated under that title below.

¹ It should be observed here that in those States which have homestead laws, the consent of the wife is necessary to a conveyance or lease, and consequently to a mining lease. *Franklin Co. v. Coal Co.*, 43 Kan. 518 (1890). The recitation of the lease in a subsequent conveyance in which the wife joins does not amount to such consent. *Ibid*.

But a license to remove minerals from

the land, when its enjoyment for the uses of a homestead is not thereby impaired, may be given by the husband without the assent of the wife. If her consent were necessary to give validity to a parol license, it would be presumed, if she had full knowledge of work done or expenses incurred thereunder and made no objection. *Harkness v. Burton*, 39 Ia. 101 (1874).

² Mont. Civ. Code, 1895, § 1271.

Maryland. *Owings v. Emery*, 6 Gill, 260 (1847). In 1840, N. O. leased to E. & H. a granite quarry known by the name of F. R., with license of quarrying and getting away stone, for the term of six years, and the lessees went into possession. In 1836, B. & C., who had title, leased to D. all their estate and interest, being two thirds part of all that lot within the farm of N. O., called F. R., for the term of five years, which, before the action brought, came to E. & G. by assignment as to one-half. The metes and bounds in both leases were the same. In an action by N. O. for rent due November, 1841, under lease of 1840:—

Held (1.) That the lease of 1836 was a grant of the superficies of the soil, and did not pass a right to the quarry, as it was not open at the date of that lease.

(2.) That this case is not one of conflicting leases, the deed of 1836 being a lease of the surface of the soil, that of 1840 a lease or license to quarry stone.

(3.) If a man hath land, in part of which there is a mine open, and he leases the land, the lessee may dig the mine; as the mine is open, and he leases all the land, it shall be intended that his interest is as general as his lease.

(4.) Making of new mines is a waste, unless the lease is of all mines on the land.

(5.) A declaration in a lease, dated 1840, that a quarry had been recently, or a short time ago, possessed and worked by W., cannot be understood as meaning that the quarry was opened for four years previously.

Michigan. *Harlow v. Lake Superior Iron Co.*, 36, 105 (1877). A tenant for years may work open mines unless restricted by the terms of his lease, but he may not open a new mine unless the privilege is explicitly granted. The lease in this case was for the purpose of mining.¹

Missouri. *McKee v. Brooks*, 20, 526 (1855). A privilege given to a lessee of doing all such quarrying, grading, and levelling as may be deemed by him requisite and proper for carrying out his business of boat building, confers upon the lessee the property in the rock so quarried.

New Jersey. *Shaw v. Wallace*, 25 Law, 455 (1856). As a general principle, a lease of land carries with it the mines thereon. But this does not apply where there is a severance of mines and surface, and an exception or reservation of the former.

A lessee of the surface, paying rent by raising ore for his lessor from the mines in the leased premises, has no right to open new mines or sink new shafts or slopes, except so far as they are necessary to the proper and successful working of the mines already opened.

New York. *Freer v. Stotenbury*, 2 Keyes, 467 (1866); s. c. 2 Abb. Dec. 189, reversing s. c. 36 Barb. 641. Where, by the terms of a lease, the lands are demised for agricultural purposes only, such limitation excludes the right of the lessee to dig stones from a quarry on the premises, though opened at the time of executing the lease.

¹ This is consequently not in accordance with the general rule.

Pennsylvania. *Kier v. Peterson*, 41, 361 (1861). "If mines are already opened, or if the lease permits their being opened, it is not waste for the tenant to work them even to exhaustion. Nor would it be waste to open new shafts or pits to follow the same vein."

Heil v. Strong, 44, 264 (1863). Where land is leased for coal-mining purposes, mining coal without paying rent, building houses and driving through faults without the lessor's consent, and appropriating the rents for the purpose, is not waste; and the lessor is not entitled to a writ of *estrepement* under the act of March 29, 1822, to prevent the same.

Penn. Salt Co. v. Neel, 54, 9 (1866). "Nor is the admissibility of T. N. as a witness for plaintiff questionable. G. had no interest in the subject-matter of the controversy; he had a lease of the surface land under which the coal was found, but he had no right to mine it, there being no opening on the leased premises through which he could do so, and no right, by virtue of his lease, to open a drift or entrance for such purpose."

Griffin v. Fellows, 81½, 114 (1878). Where there are no open mines or quarries on the premises at the date of the lease, the mining of coal and quarrying of stone by a tenant for years are waste operating as a forfeiture of the term.¹

These acts, however, may be authorized by the terms of the lease. They are so authorized by this language in the lease: "To have and to hold the above-granted and demised premises, with every privilege, right, member, and appurtenance whatsoever to the same premises belonging or in any wise appertaining, whether ways, waters, water courses, mines, and minerals of whatever description."

"If there be a lease of land with the mines in it, and there be no open mines, the lessee may dig for mines, otherwise the grant as to the mines will not take effect."²

C. Owners of Equities of Redemption.

The owner of an equity of redemption who is in possession may mine, subject only to the restriction that the security of the lien creditor, whether his lien be by mortgage or execution, must not be endangered or seriously impaired.

Michigan. *Ward v. Carp River Iron Co.*, 47, 65 (1881). It is provided by statute in Michigan as follows: Sect. 6363. "Any person entitled to the possession of lands or tenements sold under execution, may, until the expiration of fifteen months from time of such sale, use and enjoy the same as follows, without being deemed guilty of waste. He may, in all cases, use and enjoy the premises sold, in like manner and for the like purposes, in and for which they were used and applied prior to the sale, doing no permanent injury to the freehold."

This allows the working of open mines and the removal of ore therefrom, but not the opening of new mines.

¹ See *Hollinshead v. Allen*, 17 Pa. 275, on p. 11.

² Followed and approved in *Appeal of Providence Trustees*, 2 Walk. (Pa.) 37 (1885).

Ward v. Carp River Iron Co., 50, 522 (1883). Same as last case. "The judgment debtor was entitled to continue the working of a mine in a reasonable and prudent manner, having regard to the customary working before the sale, and to dispose of the proceeds. If the mining was improper, excessive, or wasteful, it might at any time have been restrained, and the parties responsible for it held liable for the damages." The plaintiff must show an injury to the freehold.

Capner v. Mining Co., 2 Green's Ch. 467 (1836). **New Jersey.** Where a farm has been purchased and is occupied for mining purposes, and a part of the purchase-money is secured by mortgage, any necessary and proper use of the property by the mortgagor in carrying on mining operations is not waste.

Vervalen v. Older, 4 Halstead's Ch. 98 (1849). Mortgagor will not be restrained from quarrying on a lot which was conveyed to him by the mortgagee as a "stone quarry lot," the mortgagor's answer denying all those charges in the bill from which it might be inferred that he was improperly impairing the value of the premises and endangering the mortgagee's security.

Trust Co. v. Quarry Co., 31 Eq. 89 (1879). After decree in foreclosure, and execution issued against an insolvent corporation, it quarried stone on the premises, leaving it on the ground. As between mortgagor and mortgagee such stone was subject to the mortgage.

See also *Lepout v. Mining Co.*, 3 N. J. L. J. 280 (1880), p. 5.

Duff's Ap., 21 W. N. C. 491 (1888). **Pennsylvania.** The owner of land has the right to remove and convert into money the minerals underlying it; but if he has lien creditors, they have the right to object to the commission of waste to the prejudice of their liens; and at their instance the owner will be restrained in the exercise of the rights and powers of an owner.

Righter v. Hamilton, 10 C. C. R. 260 (1891). Opening and operating a new mine or clay pit upon land where none existed at the time a mortgage was created, is waste as against the mortgagee, and will be enjoined at his suit. It makes no difference that the land was purchased from the mortgagee as mineral land.

IV. PROPERTY AND RIGHTS IN THE MINERALS WHERE THERE ARE JOINT OWNERS OF THE SOIL.

Tenants in common of lands containing minerals have a right to take out the minerals, although to do so tends to destroy and lessen in value the estate.¹ Such mining is not waste at common law. Each tenant in common, however, is limited to his own just share. And by this is not meant that he may mine until he has taken out his share of all the minerals in the land, for that is necessarily unascertainable, but he is entitled only to his share of what is actually taken out. It makes no difference that the mineral is practically inexhaustible.

¹ This right is limited, and the proceeds described in *Minnesota* by Gen. Stats. 1894, §§ 5830-8.

He is accountable to his co-tenants for their share of all that he mines. He must compensate them for the *value in place* of their share of the minerals which he mines and takes. This value is to be measured by the value of ore leave or royalty, that is, of the privilege of removing the mineral, which in turn is to be arrived at by expert opinion. This obligation is enforced in the same manner in the case of mines as in the case of the profits of any other real estate owned jointly.¹

This right of a tenant in common to dig for minerals, with the appurtenant right to deposit the refuse of mining on the land, is not an incumbrance on the interest of his co-tenants.

One tenant in common cannot create a new and distinct tenancy in common in the land. He consequently cannot convey mineral rights without the concurrence of his co-tenants, nor convey his interest in the land, reserving to himself the mineral rights, though he may grant a license to another to dig to the extent of his interest. Such licensee is accountable to a dissenting co-tenant.

For the same reason an owner of the surface who, with others, is a tenant in common of the minerals, may not convey a portion of the surface and his share of minerals beneath it.

Lands containing minerals are subject to partition like any others, for if they cannot be divided without prejudice to the whole, they may be awarded to one or more of the tenants at a valuation, or they may be sold and the proceeds divided.² In New Jersey, however, it has been held that when the location, extent, and value of the mineral deposits cannot be ascertained, there can be no partition. The possession by a tenant under a mining lease is not a bar to partition. Pending partition proceedings, however, mining on the property will be enjoined if it is shown that it is causing irreparable injury to the property, or will embarrass the proceedings.

United States. *Clowser v. Joplin Mining Co.*, reported in note to *Bly v. United States*, 4 Dillon, 469 (1877), C. C. W. D. Mo.

Krekel, J., in charging the jury, said: "The court approves the

¹ In Pennsylvania this right to an account is defined and a remedy provided by Act of Assembly, 25 June, 1850, P. L. 573, as also are the rights in general of tenants in common of coal or iron ore mines or minerals by Act 22 April, 1856, P. L. 502. These acts are only applicable when the rights of the complainants are equitable. *Coal Co. v. Snowden*, 42 Pa. 488.

² Pennsylvania Act 26 February, 1870, P. L. 256; Act 24 May, 1871, P. L. 1088.

rule laid down by the Supreme Court of Pennsylvania. Where a tenant in common exercises his undoubted right to take the common property, and has no other means of obtaining his own just share than by taking at the same time the share of his companion, the value of the ore in place is the only just basis of account. *Coleman's App.*, 62 Pa. St. 278."

Rainey v. Fricke Coke Co., 78 Fed. 389 (1896), C. C. W. D. Pa. Complainant brought a bill in equity against defendant for the partition of certain land which they owned in common, and of which the underlying coal constituted the principal value. Defendant in its answer conceded the right to a partition. Pending this suit, complainant extended workings from certain mines owned by him on adjoining land and began mining coal from the common land. Defendant then filed a cross-bill to enjoin such mining. *Held*, that the court had the power to enjoin such mining during the pending of the partition suit, and in view of the complications which would result from it, in the adjustment of the respective interests of the parties, and the possible injury to the common property, such power should be exercised.

Colorado. *Omaha & Grant S. & R. Co. v. Tabor*, 13, 41 (1889). A license to dig ore given by one tenant in common extends only to his interest in the mine.

Connecticut. *Hartford Co. v. Miller*, 41, 112 (1874). Where the owner of land from which mineral rights have been severed, is a tenant in common with others in such rights, and conveys a portion of the land by metes and bounds, and also his share of the mineral rights therein, the deed, so far as such easement is concerned, is inoperative as against his co-tenants.

Marsh v. Holley, 42, 453 (1875). A large quantity of lands belonging to the estate of a deceased person was distributed to seven children, with a provision in the distribution that all the iron ores in the land should be owned by them in common in equal seventh parts, and that reasonable damage should be paid to the owner of the land who should be injured in digging for or transporting the ore. Defendant, who had become owner of three sevenths, executed a bond to plaintiff for a conveyance to him of an undivided three sevenths of the ore right upon a certain farm, which was a part of the estate and adjoined other parts. In an action for breach of covenant for failing to make the conveyance, *held*, the right of the other co-tenants to dig for ore on any part of the estate, and deposit on any part of it the earth and debris thrown out in doing so, was not an incumbrance on the ore rights conveyed, but was merely an inconvenience inseparable from the nature of the estate, and to which each of the co-tenants must submit.

The defendant could not convey an undivided ore interest in a part of the estate without the concurrence of his co-tenants.

Georgia. *Hull v. McDonald*, 22, 131 (1857). If one tenant in common receive more than his just share of the proceeds of gold washings, he is liable to account to his co-tenants for such surplus, and for all the profits which he makes out of such surplus; and if there is proof that he used such surplus, and no proof as to whether he made any profits out of it or not, the presumption is that he made prof-

its out of it, and profits at least equal to the interest on the value of such surplus calculated at the legal rate.

Illinois. *Murray v. Hucerty*, 70, 318 (1873). Mining coal tends to injure, destroy, and lessen in value the estate in lands within the meaning of an act authorizing one tenant in common to maintain trespass or trover against his co-tenant for such an act.

Ames v. Ames, 160, 599 (1896). In a proceeding for partition, the surface may be awarded to one party and the underlying minerals to another, where the parties consent, and owelty may be ordered for the purpose of equalizing the shares.

"If these two separate interests and titles were united in one person, . . . the owner would have the right to sever the two estates by deed or devise. Where the owner would have that right there is no inherent difficulty in a court of chancery severing the two estates in a partition proceeding, where it is rendered necessary in the interest of justice, and decreeing the dominant estate to one and the servient estate to another. In recognizing this principle we are applying it to the facts of the particular case before us, where the defendants in error consented to accept the servient estate. We do not at this time determine the question whether a person not conversant with the management of the mine, and without capital to operate it, could be compelled to accept as his share a mine thus set off to him against his consent, or whether a mine could be set off to a minor."

Massachusetts. *Adam v. Briggs Iron Co.*, 7 Cush. 361 (1851). A tenant in common of three-fourths of a tract of land conveyed his estate, reserving the iron thereunder. This reservation was void as against his co-tenant. An attempt to create a new and distinct tenancy in common between one co-tenant and others in distinct parts of the common estate is contrary to the rules of law. The owner in severalty of land may convey the mines to one person, the quarries to another, and retain the general interest in the soil; but if the owner of an undivided part of a piece of land could do this, it would be attended with all the inconveniences to his co-tenants arising from a conveyance of his interest in a particular part by metes and bounds.

Missouri. *Watson v. U. R. & G. Gravel Co.*, 50 Ap. 635 (1892). One tenant in common has the right to sell gravel taken by him from the land, and to collect the purchase-money.

Haeussler v. Mo. Iron Co., 110, 188 (1892). Possession of land by a tenant under a perpetual mining lease will not prevent a partition suit between the co-owners, subject to the rights of the tenant.

Childs v. K. C., St. J. & C. B. R. Co., 117, 414 (1893). The excavation and removal of rock by a co-tenant from the joint land, and selling the same and thereby diminishing the value of the estate, constitute waste.¹

New Jersey. *Franklinite Co. v. Condit*, 19 Eq. 394 (1869). One tenant in common cannot convey mineral rights to the prejudice of his co-tenants. Such conveyance is void as to the co-tenant, but good as to the grantee. A grantee of the right to minerals from one tenant in common cannot call for a partition of the premises.

¹ This view is not in accordance with the general rule.

Kemble v. Kemble, 44 Eq. 454 (1888). A partition of lands containing mineral deposits cannot be ordered if the location, extent, and value of such deposits cannot be ascertained.

*Cases growing out of the ownership of the Cornwall Pennsylvania. Iron Banks.*¹ The Cornwall estate consisted of various tracts, aggregating about nine thousand acres. One of these was the Cornwall Furnace Estate, a part of which was the *Cornwall Ore Banks and Mine Hills*. In 1785, of the Cornwall Furnace Estate, Curtis Grubb owned undivided three sixths, Robert Coleman one sixth, and Peter Grubb two sixths. On Dec. 9, 1785, these three entered into an agreement for the partition of the Cornwall Furnace Estate, Hopewell Forges, and Union Forge, held by them in common, by which they appointed seven persons named to make valuation, appraisement and partition thereof, and provided that the *ore banks belonging to Cornwall Furnace* be divided into three equal parts; two parts, considering quantity and quality, be allotted to Curtis Grubb and Robert Coleman, and the other part to Peter Grubb. Peter Grubb died in January, 1786, having devised his real and personal estate to his sons, Burd Grubb and Henry Bates Grubb, to be equally divided between them.

Curtis Grubb, Robert Coleman, and the guardians of Burd and Henry Bates Grubb entered into an agreement, dated May 6, 1786 (referring to agreement above), for the valuation, partition, etc., of the Cornwall Furnace property and other estate held in common, providing that "the ore banks belonging to Cornwall Furnace aforesaid be divided into three equal parts," two parts, considering quality and quantity, to be assigned and allotted to Curtis Grubb and Robert Coleman, and the other part to Burd and H. B. Grubb. Seven persons were appointed to make the valuation and partition, of whom *Thomas Clark* was one. By this agreement Cornwall Furnace, with such parts of the lands and privileges as should be deemed necessary and equal, was to be assigned to Curtis Grubb and Robert Coleman. An equivalent for their shares was to be rendered to Burd and H. B. Grubb out of other of the real estate. Amicable actions of partition were to be entered into to effect the arrangement. On Aug. 30, 1787, another agreement was entered into, wherein it was stated that it had been found, on the fullest investigation, that the agreement of 6th May, 1786, could not be carried into execution without injustice to some of the parties. Therefore it was agreed that certain persons named (Thomas Clark being one) should make partition of Cornwall Furnace, Hopewell Forges, and all the lands, etc., according to quantity and quality, and assign and allot the same according to the real interest and conveniences of the several parties, "provided always, and it is hereby agreed, that the *ore banks belonging to the Cornwall Furnace shall remain together and undivided as a tenancy in common*, the said Curtis Grubb being entitled to three sixth parts thereof, the said Robert Coleman being entitled to one sixth part thereof, and the

¹ For the sake of convenience in reference these important decisions are grouped together. Their close relation requires this juxtaposition, and their importance on the subject of the joint ownership of mineral land justifies the unusual amount of space given to them.

said minor children being entitled to the remaining two sixth parts; and that for this purpose an accurate survey shall be made of the said ore banks and hills, if not already done, and it is hereby declared to be the true intent and meaning thereof that neither of the said parties, their agents or workmen, shall interfere or interrupt either of the other parties at any mine hole by them occupied for the purpose of raising iron ore."

A subsequent agreement of August 30, 1787, provided: "Whereas it has been suggested that the article respecting the ore banks and hills requires further explanation, and that it may so happen that veins of ore may extend beyond the limits of the survey made lately by Thomas Clark, it is agreed that the said Burd Grubb, Henry Bates Grubb, and Robert Coleman and their respective heirs and assigns shall have full liberty and privilege of ingress, egress, and regress to and from the said mine hills, and shall have free and uninterrupted liberty and power to dig, sink shafts, drive drifts, raise and carry away any ore that may be found to extend beyond the limits of the said survey, without doing any material damage to the iron works or plantations. And it is further agreed that the privileges of the water are hereby secured in most ample manner for the use of Curtis Grubb and Robert Coleman, their heirs and assigns forever, and that this memorandum be considered to all intents and purposes part of the foregoing agreement."

Amicable actions in partition were entered, and the referees (Thomas Clark being one) reported a division of the real estate, and further that the two tracts, "and also the ore banks and mine hills of Cornwall Furnace, do still remain undivided, to be held by the said Curtis Grubb, Robert Coleman, Burd Grubb, and Henry Bates Grubb, as tenants in common, according to their respective shares, and to the covenants and articles in the said agreement hereinbefore recited contained." This report was confirmed and partition ordered.

Coleman v. Coleman, 19, 100 (1852). Robert Coleman and George D. Coleman, owning fifteen forty-eighth parts of the Cornwall ore banks, brought partition against Robert W. and William Coleman, owning twenty-five forty-eighths, and E. B. and C. B. Grubb, owning eight forty-eighth parts thereof. The parties all owned furnaces on the Cornwall estate, which had to this time been supplied with ore from these banks. The banks consisted of shapeless and unstratified masses of iron ore distributed unequally as to quality and quantity under the surface, which latter was of no value.

The amicable partition above was held to be a bar to this action. This constituted a judgment in partition, and was a good defence to a subsequent action for partition of the mine hills. It was, in effect, partition of the profits of the mine hills. The soil was valueless. The ore was the object to be secured, and this was indivisible into equal parts.

The partition thus made was binding not only as a judgment, but as a covenant running with the land. If the ore should fail, or the manufacture of iron on the estate should cease, the agreement would have accomplished its mission, and the hills might then be parted. But until the happening of one or the other of these events they were to remain appurtenant to the rest of the estate as before.

"We have no doubt that any mineral lands held in common, whatever the peculiarities of their structure, are subject to partition under our Acts of Assembly; for if, upon inquest, it is found they cannot be divided without prejudice to or spoiling the whole, they may be ordered to one or more of the tenants at a valuation, or to be sold and the price divided. But neither the letter nor the policy of our statutes demands partition of an estate in circumstances such as attend these hills of ore."

Coleman v. Grubb, 23, 393 (1854). Trespass by tenants in common of the ore hills against co-tenants for ore collected and carried away, which it was alleged was taken outside the limits of the Clark survey. A draught alleged to be a survey by Clark, referred to in the second agreement of August 30, 1787, was offered in evidence, showing within its limits less than the whole of the ore hills. The jury declined to determine whether this draught was the one referred to or not.

It was held that under the first agreement of August 30, 1787, the whole of the mine hills was exempted from partition and was to be held in common, and that either of the parties in interest had the right to take from within the natural boundaries of the three hills either surface or vein ore, not interfering with openings made by either of the others, and "without doing any material damage to the iron works or plantations."

2d. In the absence of any survey as referred to in the supplemental agreement of 1787, the said agreement is considered as an extension instead of a limitation of the rights of the tenants in common; and under the supplemental agreement shafts might be sunk and drifts made beyond the base of the mine hills for the purpose of mining veins found to be contained in the hills.

3d. If the terms of the agreement were doubtful, the usage of the parties during two generations in taking ores from the hills for their respective furnaces would be an important element in their construction.

4th. Neither party could maintain trespass against the other for removing surface ore from one of the hills from above its base. "Shafts might be sunk and drifts made beyond the base of the mine hills for the purpose of mining veins found to be contained in them. Veins of ore conforming in their dip to the surface of such hills could be advantageously mined only by taking position beyond the base of the hills, sinking a shaft to the vein, and then mining it upward to the outcrop. This was probably what was intended to be secured to the parties, and hence the stipulation against damage to the iron works and plantations, all of which would be found beyond the hills, and none of them upon it."

"I see no necessity for presuming that a vein was to be mined downwards to determine whether it extended beyond given limits. When iron ore is found in veins, and the angle of inclination is ascertained, it is easily determined on the surface with sufficient accuracy for practical purposes whether they extend beyond the specified limit."

Blewett v. Coleman, 40, 45 (1861). Two of the tenants in common of the ore hills leased to plaintiff, who mined copper from the hill, but outside of the alleged Clark survey as relocated by Weidle. Other tenants carried off the ore when mined, and plaintiff brought trespass.

"The Clark survey has embarrassed the parties interested in the hills long enough." "To determine the limits of a hill may in some instances be difficult, but it was not difficult to determine what plaintiff had mined on the hills."

The Clark and Weidle surveys being disregarded, "there could be no question as to right of plaintiff or his lessors to take out copper ore from the mine hills, though iron ore only was referred to and named by the parties in the original agreement, for they owned the hills and all they contained as an estate in common before the other agreements were made, and if iron ore only was referred to therein the property in the other ores remained unchanged."

Coleman v. Blewett, 43, 176 (1862). (Same as last.) In action of trespass by a tenant of two of the joint owners, against certain others of the owners, for taking and carrying away copper ore which had been mined from the base of one of the hills outside of the Clark survey as relocated by one Weidle, it was held:—

That under the agreement of August 30, 1787, the whole of the mine hills was exempted from partition, and was to be held in common, and that within the natural boundaries of the three hills either of the parties had the right to take out any ore that might be found, such a construction being according to the terms of the agreement, the usage of the parties at that date and subsequently, and equitable;

That the Clark survey of the mine hills which was not proved to have been adopted by the parties to the original agreements, nor annexed to them, nor incorporated therein, nor in any manner made a part thereof, was dependent upon traditional knowledge by which it had been relocated by Surveyor Weidle, but which other surveyors could not locate, and which, as located by Weidle, did not embrace all the ore, nor all of the hills in question, must be set aside and disregarded as not the "accurate survey" by which the parties meant to hold the mine hills in common; and,

That the Clark survey being thus set aside, the plaintiff had the right to mine copper ore from the mine hills, and was entitled to recover from the defendants in the action of trespass.

Coleman's Ap., 62, 252 (1869), affirming *Coleman v. Coleman*, 1 Pearson, 470. Bill in equity for an account. Held, the parties to the agreement and their successors were tenants in common of the ore banks. The agreement that these should remain undivided established a permanent tenancy in common, and partition could not be had without violating the covenant which ran with the land.

The agreement provided that neither of the parties should interfere or interrupt the others at any mine holes by them opened and occupied for the purpose of raising ore. This was not a mode of providing for the enjoyment in severalty of the shares of the parties. It meant that the parties should be undisturbed in their rights as tenants in common, nor did each tenant have a mining right in the bank unlimited in extent. A man cannot have an incorporeal easement to dig ore in his own fee.

Taking ore from the surface of the earth or hollow pits is as much mining as digging it from under the ground. If a tenant in common takes more than his share of the ore taken out, he is accountable

therefor to his co-tenants; they need not wait until the whole ore is exhausted in order to ascertain his entire share, nor does it make any difference that the ore is practically inexhaustible.

They are liable to one another for ore used as well as for ore sold.

The agreement of 1787, whereby these ore banks are held as a tenancy in common, unpartitionable, does not take away the right to an account. The fact that all parties continued to use these ore banks for a long period of time without demanding an account does not deprive them of that right in this case, where for over fifty years they all took the ore simply for their own use, and recently the respondents began to sell the ore, and to take out greatly increased quantities.

"Nor, as it appears to me, can it be said that these ore banks were in any sense appurtenant to the other lands comprised in the partition of 1787. The original titles to them by warrants from the proprietors of May 8, 1732, and December 2, 1737, were separate and distinct from those lands. A thing corporeal cannot properly be appended to a thing corporeal. Co. Litt. 121 b. The owners of them and the adjacent tracts might perhaps have limited the use of the ore to the supply of the furnaces erected or to be erected on the other lands then held by them in common. There is, however, not a word in the agreement of 1787 which intimates such an intention."

The tenants in common were liable to account to one another for ore taken. The act of April 25, 1850, § 24 P. L. 573, governs this case.

"It is urged, however, that before any liability to account can arise, it must appear that the co-tenant upon whom the demand for an account is made has actually taken out more than his just share or proportion of the entire mass of ore in the beds or banks. It might be enough to say that the Act of Assembly makes no such provision. It applies to any case where coal, iron ore, or other mineral has been or shall be taken from the common property. It does not say or imply more than a just share or proportion. The remedy would be illusory if such a construction should prevail. No one can tell what the just share or proportion of each tenant will be until the whole mine or bank is exhausted of its entire deposit. In such a mass — practically inexhaustible for generations to come — it would make the one ninety-sixth part equal to the other ninety-five, and really destroy to that extent their proportionate value. Here a tenant in common exercises his undoubted right to take the common property, and he has no other means of obtaining his own just share than by taking at the same time the shares of his companions. The value of the ore *in place* is therefore the only just basis of account. This is the same as the value of what is called ore leave, — that is, what the right to dig and take the ore is worth. Indeed all parties, as well as the master and court below, seem eventually to have settled upon this basis. But how is the value of ore leave to be ascertained? It is evident in the nature of things that it can have no general market price. It will depend necessarily upon the position and circumstances of each particular mine, as well as on the character of the ore. The value of it at the pit's mouth depends upon its quality and its proximity to the furnace where it is to be used, and on the means of transportation. In addition to this, the price of ore

leave will be influenced by the expense and risk of process of mining or taking it from its place to the pit's mouth. It is evident that the price given for ore leave in other mines or beds can afford no safe criterion, unless they should be precisely similar in all respects to the one in question. As to the Cornwall ore banks, no sale had ever been made of ore leave. No evidence was laid before the master as to what, in the opinion of the experts, ore leave in these banks would have commanded in the market. The master arrived at it by ascertaining the market value of the ore at the pit's mouth, and then deducting from that the cost of mining. We cannot see, under all the circumstances, that any more just and equitable mode could have been adopted. We do not mean to say that it would hold in any other case than the one now before the court, — certainly not where the mining is expensive and hazardous. Where the tenant in common of a coal mine, for example, must with great outlay of capital construct expensive machinery, and incur all the risks of such an undertaking, the value of ore leave or coal *in place* could not be ascertained by so simple a calculation. The usual profits embarked in such a hazardous enterprise, with the proper allowance for personal skill and attendance, would seem to be no more than fair and reasonable deductions.

"Certainly any business man, sitting down to calculate what he ought to give for ore leave, would take all these elements into consideration. Otherwise, with his own capital and at his own risk, he would separate the ore from its natural position and place it on the surface, enhanced in value for the benefit of a stranger. We leave the rule in such a case to be determined when it arises."

Grubb's Ap., 66, 117 (1870). H. B. Grubb, owning one-sixth of the ore banks, died, and in the partition of his real estate in 1836, it, including his interest in the ore banks, became the joint property of his two sons, E. and C. They entered into a partnership in mining ore and manufacturing iron and selling it. The purchase-money for the land was to be paid out of the ore dug. The land was not conveyed to the firm, but was entered on the firm's books, and carried in the firm accounts. *Held*, not to have been brought into the partnership, and that E. and C. should account to one another, not as partners, but as tenants in common.

C. contracted to sell ore from the common property to H. for a particular furnace, to be paid for in iron from that furnace, E. declining to join. E. and R. afterwards bought H.'s furnace, so that he could not furnish iron. *Held*, that the contract with H. did not run with the land, and E., after the purchase, was not responsible to C. on it.

Grubb v. Grubb, 74, 25 (1873). Clement and Edward owned in common "The Mount Hope Estate," which consisted of several tracts of land and one-sixth of the "Cornwall Ore Banks." Clement conveyed to Alfred his half of "The Mount Hope Estate" designating the particular tracts, "together with the right, etc., so far as the said Alfred's right under this conveyance in said Mount Hope Furnace is concerned, of the said Clement to raise, etc., for the use of said furnace, iron ore out of three certain mine hills, etc., known as the 'Cornwall Ore Banks,' etc., but for so long and such time only as said furnace can be carried on, etc., by charcoal." *Held*, that this con-

veyance granted to Alfred a limited privilege to take ore, and did not convey the corporeal estate in the mine bills that remained in Clement.

Grubb's Ap., 90, 228 (1879). Alfred B. Grubb having acquired title to the whole of Mount Hope Furnace, claimed the right to take from the Cornwall Banks, under his deed from Clement, a full supply of ore for the furnace. Clement, contending that he was only entitled to a half supply, brought a bill in equity. The court dismissed the bill for want of jurisdiction.

"No question of waste is raised by this record. Waste is spoil or destruction done or allowed to be done to houses, woods, lands, or other corporeal hereditaments by the tenants thereof, to the prejudice of the heir, or those in reversion or remainder.

"By the act of 27th of March, 1833, P. L. 99, the provisions of the second section of the act of 2d of April, 1803, restraining waste, are extended to quarrying and mining. But it has never been held that a person who is not a tenant in possession, but possessing a right to dig ores, is guilty of waste when he takes out more ore than his contract calls for. Nor does the case come within the rule of repeated trespass for the reason that the appellant is not a trespasser. His right to dig ore from the Cornwall Banks is not disputed. The question as to whether he has a right to a whole supply for his furnace, or only a half supply, is another matter, and has no bearing upon the question of trespass."

"The appellee is the only one of the proprietors of Cornwall who is a party to the bill. Even if they had been joined as plaintiffs, the account is a mere matter of charge for certain number of tons of ore, with no entries on the other side of the account. It was clearly the subject of an action at law, and the appropriate form of action is *assumpsit*."

Grubb v. Grubb, 101, 11 (1882). C. B. Grubb brought *assumpsit* for the one-half of the ore taken by A. B. Grubb to supply the Mount Hope Furnace.

For the clause in said deed bearing upon this subject, see *Grubb v. Grubb*, 74 Pa. 25, above. *Held*, that the defendant was entitled to the full supply. The deed should be construed most strongly against the grantor. This construction is also upheld by the circumstances surrounding this conveyance in 1845, when those who had interests in the banks took all the ore necessary for their furnaces without accounting, the banks being practically inexhaustible for the purposes of supplying furnaces as then worked.

Christy's Ap., 110, 538 (1885). In partition in the Orphan's Court, in the absence of a severance by the testator, the court has no power to order the coal and surface to be divided and appraised separately. Whether the inquest could make such division and appraisal is not decided.

Fulmer's Ap., 128, 24 (1889). A tenant in common, who is in possession of mineral lands and works the same, must, under act of April 25, 1850, P. L. 573, account to his co-tenant for his share of the minerals removed. Slate is a mineral within this act. The measure of the compensation is the value of the mineral *in place*, the true representative of which is the value of the royalty which could be

obtained for the privilege of removing the mineral. In the conduct of an inquiry upon this point regard should be had to all the circumstances of the particular case, and the evidence should be directed to the special instance of the mine or quarry in question. The value of the royalty is to be ascertained by expert testimony. *Coleman's Ap.*, 62 Pa. 252, was altogether exceptional, and the decision is confined to the particular facts under consideration. In that case there had never been any sales of ore leave at the Cornwall Banks, and there was no proof of the opinion of experts as to the value of such ore leave.

Winton Coal Co. v. Pancoast Coal Co., 170, 437 (1895). Where the amount and value of the coal mined by one co-tenant is undisputed, and the only question is whether the plaintiffs' interest is one-eighth or one-fourth, he may maintain an action of assumpsit in which that question may be determined.

There being no question of account, the case is not within the acts of April 25, 1850, and April 22, 1856.

Mercur v. State Line & Sullivan R. Co., 171, 12 (1895). In a proceeding in equity under the act of April 25, 1850, to ascertain the quantity and value of coal mined by one of several tenants in common, the plaintiff is not bound by the royalty fixed in an agreement by which another of the tenants in common sold his interest to one of the defendants. The quantity and value of the coal mined are questions of fact to be fixed by agreement or determined from the evidence. And a finding of a master thereon, confirmed by the court below, will not be disturbed.

Enterprise O. & G. Co. v. National Transit Co., 172, 421 (1896). A co-tenant who receives more than his just share of the profits is liable to account to the other co-tenants. If he has made an express promise of a liquidated sum, assumpsit will lie against him; otherwise the only remedy is by account for a share of the profits. In no case is his co-tenant entitled to take a share of the product.

Several co-tenants of an oil lease assigned it to an operator for a share of the product, which was delivered by the assignee to the defendant to the credit of the co-tenants. One of the joint owners, who did not join in the assignment, notified the defendant not to deliver any oil to his co-tenants. *Held*, the parties joining in the assignment were entitled to all the oil in defendant's hands.

Conant v. Smith, 1 Aiken, 67 (1826). The court will not order partition of real estate in common where the value of the several parts cannot be ascertained, as in the case of an ore bed. Nor will they, in such case, order a sale thereof or an assignment to one of the parties, though authorized by the statute; but the proper remedy of the party aggrieved is by application to the Court of Chancery.

Williamson v. Jones, 39, 231 (1894). Defendant claimed to own the land in question in fee. Plaintiffs claimed, and the court so found, that they owned seven-tenths thereof in remainder after the death of their sister.

Defendant being a co-owner in fee to the extent of three-tenths, has "the right to drill wells into the oil strata of the inheritance and take his share of the oil, provided he does not take more than his share.

But he is not entitled to appropriate more than his share of the product. This refers to his share of the net profit after deducting all expenses incident to the working. I should think that a co-owner who has expended so large a sum, entirely at his own risk, but with the knowledge of the other co-owners, in so hazardous an enterprise as developing oil in an unexplored field, ought not to do more than account to them for their proportion of a customary royalty, proper and fair under the circumstances."

Pending the final disposition of the case, special receivers were appointed to take control of seven-tenths of said royalty, the defendant to continue to work the wells, he being solvent and responsible and an energetic, experienced, and skilful operator.

Wisconsin. *Tipping v. Robbins*, 64, 546 (1885). Same case, 71, 570 (1888). A license by one tenant in common to prosecute mining on land does not bind a dissenting co-tenant. A statute providing that no license to mine shall be revocable after valuable discovery unless the right be forfeited by negligence, has no application where the license has been given by one tenant in common without the consent of his co-tenant. A licensee having mined without this consent is accountable to the co-tenants for the value of their share of the mineral taken out, less the expense of digging it out and removing it from the mines.

V. PROPERTY AND RIGHTS IN MINERAL OIL AND NATURAL GAS.

Oil and natural gas are minerals in the view of the law;¹ but because of their peculiar attributes they, as the subject of property, differ from other minerals. They have been very properly and adroitly called by Justice Mitchell of Pennsylvania (*Westmoreland Nat. Gas Co. v. De Witt*, 130 Pa. 235) "minerals *feræ naturæ*," owing to their fugitive and wandering existence. Out of possession there is no property in them. If they once escape from the land of one person into that of another, and become subject to the control of the latter, he may take possession of them and thus become their owner. As minerals, they are a part of the realty until they have been severed from it; and when they are severed from it by artificial means, whether by the owner or a trespasser, they become personal property and belong to the owner of the soil through which they are extracted. If their severance is occasioned by the lawful act of another land-owner on his own land, whereby they come into his possession, they belong to him and not to the owner of the land under which they formerly lay, who failed to reduce them to possession.

But they are not capable of distinct ownership *in place*, owing

¹ Act of Cong. Feb. 11, 1897.

to their liability to escape from the place where they may be temporarily confined without, necessarily, any interference on the part of the owner of the soil, or others claiming through him, under whose land they may be found. Like water, they are not the subject of property except in actual occupancy, and a grant of them passes nothing for which ejectment will lie. The fact that oil and gas cannot, while in the ground, like the solid minerals, be the subject of an estate distinct from that in the soil, is the foundation of the distinction between oil and gas rights and general mineral rights, which distinction will be treated of at length under the title of "Oil and Gas Leases," Chap. II., Div. V.

United States. *Brown v. Spilman*, 155, 665 (1895). Shiras, J.: "Petroleum oil and gas are substances of peculiar character. Decisions of ordinary cases of mining for coal and other minerals which have a fixed *situs*, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are part of it so long as they are on it, or in it, or subject to his control, but when they escape or go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas under his neighbor's field so that it comes into his well, it becomes his property."

Indiana. *People's Gas Co. v. Tyner*, 131, 277 (1891). The owner of land may sink a well thereon and draw therefrom all the natural gas that will naturally flow therefrom, although in so doing he draws gas from beneath his neighbor's land. And he may enlarge the flow of his well to any size and by any lawful means. "Water, petroleum oil, and gas are generally classed by themselves as minerals possessing in same degree a kindred nature. . . . What is said of the fugitive character of percolating water and of petroleum oil applies with greater force to natural gas." *Westmoreland Gas Co. v. De Witt*, 130 Pa. 235, approved.

Columbian O. Co. v. Blake, 13 Ap. 680 (1895). An instrument executed by a married woman conveying all the oil and gas under her separate estate with the right to erect and maintain thereon all buildings and structures, and lay all pipes necessary for the production and transportation of oil and gas taken therefrom, is within Rev. Stats. 1894, secs. 6961, 6962, prohibiting a married woman from incumbering or conveying her real estate, except by deed in which her husband joins.

The oil and gas while remaining in the earth are parts of the realty. Even if they were not, the additional rights to the use of the land would bring this contract within the statute.

Kentucky. *Hail v. Reed*, 15 B. Monroe, 479 (1854). Oil is a part of the land; when severed it becomes personalty, and remains the property of the owner of the land. Defendant entered upon plaintiff's land, bored a well and took out oil. *Held*, trover or detinue might be maintained therefor.

The argument that oil, like water, was capable only of a usufructuary property, and was the property of whoever reduced it to his possession, was repudiated.

Shepherd v. McCalmont Oil Co., 38 Hun, 37 (1885). **New York.** This was a license to W. and his assigns. It did not convey to him a corporeal hereditament. "We do not understand that there can be any property in rock or mineral oil, or that title thereto can be divested or acquired until it has been taken from the earth."

Hughes v. United Pipe Lines, 119, 423 (1890). Oil in the earth belongs to the owner of the land, and when taken therefrom by a wrong-doer, the land-owner's title to the same still remains perfect, and he can pursue and reclaim it wherever he can find it, as in the hands of the bailee of the trespasser.

Punk v. Haldeman, 53, 229 (1866). **Pennsylvania.** **C. J. :** "Throughout this opinion I have treated oil as a mineral. Until our scientific knowledge on the subject is increased, this is the light in which the courts will be very likely to regard this valuable production of the earth. But out of this results the difficulty of a strict classification of a right to take it as an incorporeal hereditament. If a mineral, it is a part of the land, and a right to take land or any part of land is not, strictly speaking, an incorporeal hereditament. Nor is the right to firebote, or plowbote, or turves; and yet for the want of a better classification this is treated in the law as an incorporeal hereditament. To the same head is to be referred these oil rights."

See also concurring opinion of Woodward, P. J., in *Keir v. Peterson*, 41 Pa. 359 (1861).

Dark v. Johnston, 55, 164 (1867). Oil, like water, is not the subject of property except in actual occupancy, and a grant of it passes nothing for which ejectment will lie. It is a right, not to the oil in the ground, but to the oil that the grantee may find.

Stoughton's Ap., 88, 198 (1878). Oil is a mineral, and a part of the realty; though by severance it may become personalty. Oil is not less part of the realty than timber and coal. It is like coal or any other natural product which *in situ* forms part of the land. Whenever a conveyance is made of it, whether called a lease or a deed, it is in effect a grant of a part of the *corpus* of the estate, and not a mere incorporeal right.

A guardian under his ordinary power to lease his ward's real estate has not the power to lease land with the right to bore and dig for oil for a term of years at a royalty. *This amounts to an absolute sale of the oil.*¹

Westmoreland Nat. Gas Co. v. De Witt, 130, 235 (1890). **Mitchell, J. :** "The real subject of possession to which complainant was entitled under the lease was the gas and oil contained in, or obtained through, the land. The learned master says that gas is a mineral, and while in

¹ This expression must be taken to mean not a sale of the oil *in place* as a distinct estate, but a sale of so much as is pumped from the ground and converted into personalty. In view of the later decisions in Pennsylvania, the remarks in this case on the nature of oil and property therein cannot be considered authoritative.

situ is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes which require the application of precedents arising out of ordinary mineral rights, with much more consideration of the principles involved than of the mere decisions.

"Water also is a mineral, but the decisions of ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not fanciful, as *minerals feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their 'fugitive and wandering existence within the limits of a particular tract is uncertain,' as was said by Chief Justice Agnew in *Brown v. Vandergrift*, 80 Pa. 147, 148. They belong to the owner of the land and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant owner, drills his own land, and taps your gas, so that it comes into his well under his control, it is no longer yours, but his.

"And equally so as between lessor and lessee in the present case; the one who controls the gas, has it in his grasp, so to speak, is the one who has possession in the legal as well as in the ordinary sense of the word."

Acheson v. Stevenson, 146, 239 (1891). "Oil is a mineral *feræ naturæ*, and is part of the land, and belongs to its owner only so long as it is in the land and under his control; and as soon as the oil left the land of the plaintiff and flowed on or into the lot of Mrs. Schmitz, it belonged to her, unless some contract or covenant existed between the plaintiff and her by which this rule of property in oil *in situ* was inoperative."

Hague v. Wheeler, 157, 324 (1893). Plaintiffs, an individual, and a gas company, were owners of lands in a gas basin, and had opened wells upon their lands from which they obtained gas in quantities sufficient for commercial use. Defendants were owners of adjoining lands in the same basin. At the solicitation of the gas company they opened wells upon their lands, but failed to obtain gas sufficient for commercial use. The object of the gas company in requesting defendants to open the wells was to purchase the land, and the wells were opened in pursuance of a negotiation entered into for that purpose, which afterward failed. Defendants did not plug the wells, but permitted the gas to escape and go to waste. Plaintiffs entered upon defendants' land, and shut in the gas and closed the well. Defendants then threatened to remove the cap and permit the gas to escape. An injunction to restrain them from so doing was refused, it being held that the suggestion of malice or negligence was negatived by the proof that defendants had drilled the well at the request of the gas company.

Williams, J.: "But it is said that the oil and gas are unlike the solid minerals, since they may move through the interstitial spaces or crevices

in the sand rocks in search of an opening through which they may escape from the pressure to which they are subject. This is probably true. It is one of the contingencies to which this species of property is subject. But the owner of the surface is an owner downward to the centre, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron or other solid mineral he may mine and carry away. The oil and gas he may bring to the surface and sell, in like manner to be carried away and consumed. His dominion is, upon general principles, as absolute over the fluid as the solid minerals. It is exercised in the same manner and with the same results. He cannot estimate the quantity *in place* of gas or oil as he might of the solid minerals. He cannot prevent its movement away from him towards an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock or the coarseness of the sand composing it; but so long as he can reach it and bring it to the surface, it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property. In the disposition he may make of it he is subject to two limitations. He must not disregard his obligations to the public. He must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy, or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute."

West Virginia. Wood Co. Petroleum Co. v. W. Va. Transportation Co., 28, 210 (1886). Natural gas is incapable of being absolute property, and is the subject of qualified property only, belonging to him who first appropriates it. A landlord leased to his tenant certain premises for the purpose of taking oil therefrom at a fixed royalty. The tenant opened a well which produced both oil and gas. The former in small quantities was pumped from the well, for which the royalty was paid, and the latter in large quantities issued by its own force from the well, and was separated by the tenant, and by means of pipes conducted beyond the leased premises and sold or appropriated by the tenant for his own use. In an action brought by the landlord for an account and the value of the gas, the tenant was held not accountable. If the tenant had attempted to use the land to produce gas alone, under the terms of the lease his term would have been forfeited; or if the gas had not escaped of its own force, he would not have been permitted to pump it without the lessor's consent.

Williamson v. Jones, 39, 231 (1894). Oil in place among the strata of the earth is a part of the inheritance. An unlawful removal thereof is a disherison of him in remainder constituting waste, which will be enjoined by a court of equity. *Petroleum Co. v. Transportation Co.*, 28 W. Va. 210, does not lay down a different doctrine, even as to natural gas, so long as it is confined in the strata where it is found. It is only when it escapes out of the possession of the owner that the right of property is gone.

CHAPTER II.

PROPERTY AND RIGHTS IN MINERALS WHERE THE TITLE
TO THE MINERALS OR THE RIGHT TO TAKE THEM IS
VESTED IN SOME ONE WHO IS NOT THE OWNER OF
THE SOIL.

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| I. Estate in Fee Simple in Minerals in Place. | A. Lease of Lands with Privilege of digging and boring for Oil or Gas. |
| II. Lease of Land with Mining Rights. | B. Incorporeal Rights and Licenses relating to the Extraction of Oil and Gas. |
| III. Incorporeal Rights to Minerals. | |
| IV. License to Mine. | |
| V. Oil and Gas Leases. | VI. Reservations and Exceptions. |

THOUGH minerals undisturbed, or *in place*, are a part of the freehold, and as such usually belong to the owner of the soil, they are capable of separate ownership and distinct possession. When there is such a severance of estates, the minerals are real estate constituting a separate corporeal hereditament, capable of distinct inheritance and conveyance. There may be a further separation of the different strata, or of minerals of different kinds, each of which may have a different owner and constitute a distinct estate in land. Moreover, the grant of the permanent or absolute interest in the minerals effects such a severance, and is equivalent to a conveyance in fee of the estate in the minerals separate from that of the owner of the soil.

The owner of land may likewise create an interest in the minerals distinct from his own ownership of the land by the creation of a right to take the minerals, himself retaining the property in them until they are severed and in the possession of the grantee. Thus there arise two clearly distinguished classes of the mineral estate: First, the absolute corporeal ownership of the minerals *in place*; and second, the incorporeal right or license to mine for the minerals in the earth. Lying between these is the right and property of one who holds land under a lease for years for the purpose of or with the privilege of mining.

The instruments creating all of these interests in real estate are indiscriminately called "Mining Leases."

I. ESTATE IN FEE SIMPLE IN MINERALS IN PLACE.

A conveyance of all the minerals, or a defined part or kind thereof, in or under a tract of land, *passes an estate therein in fee*. If the description is sufficient to contain the *whole of the minerals*, it is unimportant whether they be described as such or the conveyance be of the usufructuary rights to them, provided those rights are equivalent to the permanent or absolute ownership. Such an owner has all the rights of an owner of land in fee, with the same remedies to assert and defend those rights and to protect his title.

The ownership of the mineral is vested immediately upon the delivery of the conveyance. Minerals *in place*, then, being land, are conveyed in the same manner, and are subject to the same rules as regards their transfer, as land is. The Statute of Frauds and the law governing the transfer of interests in real estate are applicable to the transfer of such interests in the minerals. A separate estate in the minerals may be created not only by an affirmative grant, but also by reservation or exception in a conveyance of the land. (See p. 83.)

The form of the conveyance is unimportant. It makes no difference that it is called a lease, and that its terms are those for leasing real estate. *If it shows an intention to convey all of the specified mineral* in the particular land, it effects a sale or absolute conveyance thereof.

If the instrument shows such an intent, it is none the less a sale because a term of years is prescribed within which the mineral must be taken out. Nor is the nature of the grantee's estate changed by the fact that he fails to mine during that term. There is in such case a sale to him, not a lease; but a reversion takes place at the end of the term to the grantor.

The fact also that the purchase-money depends upon the amount of coal mined is of no moment in determining the nature of the estate. The question is whether all the coal is conveyed; if so, there is a sale thereof.

The rather paradoxical result of the above statement—that the nature of the estate is unaffected by the limitation of the privileges to a term of years—is apparently a fee-simple estate for a term of years. This seems to have deterred some courts

from following in terms the rule as laid down in Pennsylvania. It seems, nevertheless, that that position is a necessary one, however it is worked out, and it may be theoretically justified on either of two lines of reasoning, both of which seem to have the support of the court that originally laid down the rule. First, the limitation to a term of years may be regarded as a limitation, not upon the estate, but upon the appurtenant rights, without which the estate will be of no value. Second, the failure to take out all the mineral within the specified term may be treated as a forfeiture of the estate.

A limitation of the general doctrine has been made by the Court of Appeals of New York. By that court it is held that it only applies to a case in which the whole body of mineral is considered as of cubical dimensions, and capable of description and separation from the earth above and around it. If, so considered, it is conveyed as it lies in place, a separate estate in fee passes. If, however, the description or the grant is so narrowed or restrained by restrictive provisions that the mineral is not capable of being so considered, the conveyance does not have this effect. A conveyance therefore of *all* the merchantable coal that will pass a certain screen, and which can be safely, economically, and profitably mined, does not pass a corporeal interest in the coal. And if such a conveyance further contains the usual provision that the consideration shall be a royalty, though with a stipulation for a minimum amount, it is construed in that State to be merely an executory contract, the thing sold and the price to be paid being dependent, it is said, on future conditions.

Although this distinction has not been raised in Pennsylvania, it may be fairly inferred from what was said both by counsel and the court in *Lillibridge v. Lackawanna Coal Co.*, 148 Pa. 293, where a conveyance of all the merchantable coal in a certain tract passed a fee in the coal, that the reasoning of the New York court will not be accepted there.

United States. *Adams v. Ore Knob Copper Co.*, 7 Fed. 634 (1880). C. C. W. D. N. Car. A conveyance of "all the mineral and metallic interest on the following-described lands" passes a fee-simple interest in the minerals and metals, and the privilege of using the land as far as necessary for the specified purpose.

Alabama. *Williams v. Gibson*, 84, 228 (1887). Minerals in place are a part of the freehold, and constitute landed property. They are capable of a *possession separate* from that of the surface,

and may form a separate corporeal hereditament which is the subject of a distinct inheritance.

Illinois. *Manning v. Frazier*, 96, 279 (1880). Minerals in a mine under the soil are real estate capable of being conveyed like other real estate, and when so conveyed, capable of being inherited and conveyed to others.

Where the owner of land bargains and sells all the minerals thereunder, and grants to the vendee the right to enter and search for said minerals, and to dig, mine, explore, and occupy with the necessary structures, and to mine and remove the coal, limestone, etc., for which the vendee agrees to pay a stipulated price per ton for the various minerals removed, payable quarterly, the grantor will have a vendor's lien on the minerals not mined and removed, for unpaid purchase-money, which he may enforce by a sale thereof.

The stipulated price is purchase-money of the real estate, not of the minerals removed. It is not a collateral covenant. The payment of so much per ton is only a mode of ascertainment of the purchase-money, the amount due each quarter depending upon the quantity mined during the preceding three months. The fact that the coal may under the deed be removed and sold does not amount to a waiver of the lien absolutely, but only *pro tanto* as to the coal so removed.

Consolidated Coal Co. v. Peers, 150, 344 (1894). A lease for the full term of twenty-five years of the sole and exclusive right of mining and operating any coal on described tracts of land is not a mere license, and is assignable.

"The right granted is not limited to any particular vein or stratum, but extends to all coal under said lands, and it is exclusive of the whole world, including the lessors themselves, and is for the full term of twenty-five years from the date thereof. The law, as we understand it, is that a lease of the right and privilege to mine and take away stone or coal from the lessors' land is the grant of an interest in the land, and not a mere license to take stone or coal."

Indiana. *Knight v. Coal Co.*, 47, 105 (1874). An agreement whereby A. bargains, sells, and conveys to B. all the coal, iron, limestone, fire clay and oil in, upon, and under a certain tract of land, granting him the right to enter and search for the said minerals, and when found to remove them, together with all rights and privileges incident to mining, building rights, rights of way, and also the right to remove minerals from adjoining lands "through, over, or under said lands, during the continuance of this agreement," and B. agrees to enter and search for the said minerals, and should he find them in sufficient quantity to justify him to mine them, to pay within ten years five dollars, and yearly thereafter "during the continuance of this agreement" a royalty on minerals taken out, B. to have the right of abandoning the lands and mines at any time, — is a lease and not a license, and creates an estate at will.

Kentucky. *Kincaid v. McGowan*, 88, 91 (1887). D., who owned a tract of land, conveyed to McG. two parcels within the same, but reserved to himself in the deeds, in the one case "all," and in the other "one-half, of all the mines and minerals in the bowels of the earth," within the boundaries of the parcels conveyed. D. then

conveyed to K. the entire tract except what he had previously sold. *Held*, by the reservations in the deeds to McG., D. retained an estate in fee, a corporeal hereditament in the minerals beneath those parcels; but this estate did not pass by the deed to K. The mineral interest being a distinct interest from the surface right conveyed, and also being separated from the balance of the tract by designated boundaries, would require apt words to convey it. "When the mines form part of the general inheritance, they will, of course, be transferred along with the lands, without being expressly mentioned in the conveyance; but when they form a distinct possession or inheritance, a distinct title to them must also be established." Bainbridge, p. 129.

Massachusetts. *Inhabitants of Worcester v. Green*, 2 Pick. 425 (1824). The Proprietors of Worcester in 1733 passed a

vote "that one hundred acres of the poorest land on Mill Stone Hill be left common for the use of the town for building-stones." This was held not to pass the land itself, which was subsequently granted by the proprietors to other persons, and against whose successors in the title the inhabitants could not maintain trespass for cutting wood thereon.

Wilde, J.: "By a grant of mines the grantee has the power to dig and carry away only; the land itself does not pass, unless it be by feoffment and livery of seisin. . . . The grantee may maintain trespass *quare clausum fregit* for any wrong done him, but he has not a fee in the land."

Adam v. Briggs Iron Co., 7 Cush. 366 (1851). "We suppose it well settled that there may be a separate estate in mines and ores, distinct from that of the land." The presumption that minerals belong to the owner of the soil "may be rebutted by evidence, showing a severance of the mines, and a distinct estate and interest in them by grant or reservation." When so severed by the general owner, and thus constituted a distinct estate, mines are still regarded as real estate, and the general laws regarding real estate will apply to them.

Chester Co. v. Lucas, 112, 124 (1873). A grant to one and his heirs of all the iron ore, metals, and minerals in a described tract of land, with the right to enter and dig, and carry away the ores, etc., and to erect and use buildings and structures for preparing it for market, and the right to dig wells and use water and to build necessary roads, the grantor "having one year's notice previous to commencing to dig upon the premises," is a grant of a present estate in fee of the ore, etc., and gives the grantee possession so as to maintain an action against a trespasser who removes the ore, although the grantee had given no previous notice of his intention to dig upon the premises.

Michigan. *Hartford I. M. Co. v. Cambria M. Co.*, 93, 90 (1892).

By the provisions of a mining lease the lessor "licensed" the lessee to enter upon described land "with the right to mine, ship, dig, and carry away" iron ore for a term of twelve years. The conditions and covenants were that lessee should have "the exclusive right to mine, etc.," during the term, that lessor should have possession of the land not occupied by lessee, that lessee should pay a royalty, but not less than a certain amount, and mine a fixed amount, or so much more as could be reasonably mined. This was not a mere license. Lessee had property in the minerals, and could maintain trover for ore mined and carried away by a trespasser.

Missouri. *Austin v. Huntsville Coal & Mining Co.*, 72, 535 (1880).

An instrument which purports, in consideration of a fixed annual rent, to lease and convey for a certain time all the coal on or under certain land is a lease. It authorizes the lessee to take out all the coal he can mine on the premises during the term, but is not a grant of the coal in the land. Where the lessee, under such a lease, does not enter upon the land, he has a mere interest to mine: he does not acquire possession of the land or property in the coal, and the lessor may maintain trespass against one wrongfully mining thereon. The existence of the lease is no defence to such an action, nor is a settlement with such lessee. Even if there had been an entry by the lessee, the lessor might have based his action upon the permanent injury to the freehold consequent upon taking large quantities of coal therefrom.

Wardell v. Watson, 93, 107 (1887). Minerals in place are land, and may be conveyed as such, and when conveyed they constitute an inheritance separate and distinct from the surface.

Hobart v. Murray, 54 Ap. 249 (1893). H. demised and leased to P., his heirs, executors, administrators, and assigns, certain described tracts of land, "for mining and manufacturing purposes only, and for the term of five years at least from the date hereof, and until the mines opened and hereafter opened on any of the said lands shall be worked out, but to continue during the existence of mineral on said lands, for said purposes," P., his heirs, etc., to have the right to enter upon the lands, to mine, dig, explore, and bore for certain named minerals, to make and use the necessary works, machinery, and buildings, H. to have the right to cultivate the lands, but not to interfere with P.'s rights. The consideration was a royalty on all minerals mined and delivered. This was held to be an absolute grant of the minerals, exclusive in the grantee.

New Jersey. *Hartwell v. Camman*, 2 Stockton's Ch. 128 (1854). Mines may form a distinct possession or inheritance from the surface. A bargain and sale to a man and his heirs of "the right, title, and interest in and to all mines and minerals opened or to be opened," with free ingress and egress, for purposes of mining in a certain described tract, passes a fee simple in the mines.

Shaw v. Wallace, 25, 453 (1856). As a general principle a lease of land carries with it the mines thereon; but this does not apply where there is a severance of mine and surface, and an exception or reservation of the former.

Suffern v. Butler, 4 C. E. Green Ch. 202 (1868). An instrument granting and conveying the right to enter upon described lands and take the ore and minerals thereon forever, unless none be found within forty years, though it be called a lease, is a grant in fee.

"The paper itself is a strange one, not known to or devised by any conveyancer familiar with the common law." Affirmed in *Suffern v. Butler*, 21 Eq. 410 (1869).

O'Donnell v. Brehen, 36 Law, 257 (1873). An agreement by the owner of land to let another take the sand out of a pit fifty feet wide the entire length for \$650, and to give him one year's time to take it out, is for the sale of an interest in lands, and is within the Statute of Frauds.

East Jersey Co. v. Wright, 32 Eq. 248 (1880). A license confers a right of property in minerals when they have been severed from the freehold, while a lease is the conveyance of an actual interest in the thing demised.

New York. *Canfield v. Ford*, 28 Barb. 336 (1858). A conveyance to one "and to his heirs and assigns forever" of "all the mines, ores, minerals, and metals lying or being in or upon" certain described land, together with the right to raise, work, and carry away the same, the right to put up all buildings and to use all lands necessary for that purpose, and the right of ingress and egress for that purpose, passes a corporeal hereditament, an estate of inheritance, for a part of which an action of partition will lie.

Marvin v. Brewster Iron M. Co., 55, 538 (1874). A deed of lands reserved "always all mineral ore now known or that may be hereafter known, with the privilege of going to and from all beds of ore that may be hereafter worked." The grantor and his assigns owned all the mines, minerals, and ores upon the described land.

Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co., 82, 476 (1880). The complaint set forth the following facts: In 1856 T. owned a tract of land through which the State made a cut for a canal, and in so doing large piles of marl were thrown up on the sides of the cut. In 1865 T. sold the land to S., excepting the beds and deposits of marl lying on both sides of the cut, and providing "that said marl may remain on said land for a period of ten years," and giving the seller the right to remove it or any part of it within that time. In 1866 T. conveyed the marl to B., who removed portions thereof and subsequently conveyed to plaintiff's grantor. In 1869 T. again became owner of the land, and remained so until his death the same year. The land was then sold to E., and thereafter by him to defendants, who held possession of and claimed to own the land and the marl.

Held, the piles of marl were a part of the realty. By the deposit it became incorporated, and after as before the digging of the canal it was a part of T.'s freehold; and this without regard to the question whether or not the State, before cutting the canal, had acquired title to the land.

The exception in the deed was of an interest in the land terminable at the expiration of ten years; and if the right of removal was not exercised within that period, the grantee should be held relieved from the burden of the exception.

B.'s interest was real estate within the recording acts. The exception in the deed to S. was not constructive notice after the expiration of ten years.

The repurchase by T. merged the reserved right to the marl saved from the grant to B.

Bank v. Dow, 41 Hun, 13 (1886). Where the owner of land conveys the same, "excepting and reserving all the oil, gas, and other minerals in and beneath the surface of said premises, with the exclusive right to dig, bore, mine, and operate for the same," and with the right of way over said premises, as the same may be necessary and convenient for such operations, for twelve years, and with the right

during that period to use so much of the premises as may be necessary and convenient to erect tanks, engines, buildings, machinery, etc., for the purpose of such operations, and at any time to remove the same, and also the right to take water for use in such operations, — the interest reserved is not a mere license: it is an interest in real estate, and as such is subject to the lien of a judgment.

Genet v. D. & H. Canal Co., 136, 593 (1893), reversing s. c. 122, 505. Plaintiff, by an instrument in writing called a "Memorandum of Agreement," leased "to defendant, its successors and assigns, all the coal contained in or under" a described tract. "Said coal . . . to include all the coal that can be economically mined or taken out" from the premises. Lessee agreed to mine ten thousand tons a year for two years, and after that twenty thousand a year, to pay for at least ten thousand a year, and to pay interest on any deficit below twenty thousand until made up. It was further agreed that if the coal in any of the veins should not prove to be of a merchantable quality, or if it became impracticable to mine the same in consequence of extraordinary expenses in mining and cleaning said coal, or if the veins should prove to be of such quality or thickness that the coal cannot be mined and prepared for market without greater expense than is bestowed upon coal taken from the same veins in the mine of the party of the second part for the time then being, then the liability of the said party of the second part to mine, take, and pay for said coal shall cease." And in such event payment was only to be made for coal that could be safely and economically taken out. The consideration was a royalty on the merchantable coal, which term was defined by the contract. Provision was also made for abandoning such parts of the coal as should contain faults, unless lessor should direct that they be "driven," in which case a fixed sum for each fault must be paid to the lessee by the lessor.

Finch, J.: The Pennsylvania cases "have held, until the rule must be deemed firmly established in those tribunals, that a transfer of all the coal in, on, or under a given described surface, even though taking the form of a lease and terminable in a fixed number of years, is a sale of the coal, and a grant of it in fee as a severed parcel of the land. The doctrine is, perhaps, most fully developed in *Sanderson v. Scranton*, 105 Pa. 469. . . . Whatsoever we may think of the general doctrine, one thing about it is quite obvious. It applies to a case, and only to a case, in which, by the terms of the agreement and in contemplation of the parties, the whole body of the coal, considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. The thing sold must be such that it can be identified as land, and severed as land from the estate of which it forms a part. Every case upholding the doctrine, which I have been able to examine, has that marked characteristic. (*Caldwell v. Fulton*, 31 Pa. 475; *Caldwell v. Copeland*, 37 id. 427; *Armstrong v. Caldwell*, 53 id. 284; *Scranton v. Phillips*, 94 id. 15; *Sanderson v. Scranton*, 105 id. 469, and 109 id. 588; *Fairchild v. Fairchild*, 7 Cent. 873; *Montooth v. Gamble*, 123 Pa. 240; *Kingsley v. Coal & I. Co.*, 144 id. 613; *Lazarus Est.*, 145 id. 1.) That feature seems

to be not merely accidental or incidental, but a vital and essential element of the doctrine as it is asserted and applied. But that feature does not exist in the present case. The broad words of the primary grant are, indeed, sufficient, within the cases cited, to carry title to the coal as land, but they are cut down, narrowed, and restrained by the specific provisions which follow. It is not the mine as such, it is not the veins or strata as such, it is not the coal in place, it is not even the whole of the coal, which one party contracts to sell and the other party to buy, but only some unknown and indeterminate fraction or portion of the coal which no human power can locate or identify as land. It is mineral product, not land, which is the subject of the dealing. It is to be, first, such portion of the coal as shall prove to be 'merchantable,' and which equals in quality the average yield of the adjacent mines; . . . it is, second, to be such, and so much, as does not pass a screen with half-inch meshes; it is to be, third, only so much as can be safely and economically mined; it is to be, fourth, so much merely as can be mined and cleaned without greater expense than the mining on adjacent property requires; it is to be, fifth, no more than it will be profitable to mine when the veins approach exhaustion." Then, in case a fault is encountered, it need not be driven if the cost would exceed \$500; "in which event the coal beyond the fault would not pass at all. The very terms of the description show that nothing was further from the purpose of the parties than a grant of the coal as land, and that the defendant company could not lay its hand upon any specified cubical mass of coal and say, this is mine, as land according to the description in the deed; for it could not know, and nobody could know until a future determination, what part or portion of the vein would really pass. It will not meet the difficulty to say that these restrictive clauses bear only upon the amounts to be paid and the method of ascertaining those amounts. Nothing indicates that the defendant was to have any coal that he did not pay for, and so by its conclusive inspection could confiscate, as below grade, half of the product of the mine; and the very terms used show that they described not only what the company should pay for, but also what it should take."

"The title to the coal was to pass in the future, and conditionally upon the existence of facts later to be ascertained. Of course it was absurd to provide that the company should not be liable to take a part of the coal when by force of the deed it took the whole at once and *in presenti*, and absolutely in fee. All the terms of the instrument are inconsistent with an immediate passing of the title. What was to pass, and what price should become payable, were both adjourned, to be settled by the developments of the future. The contract was executory on both sides. What and how much coal was to pass from the lessors and to the lessee was made dependent upon the revelations of the actual mining process, and what and how much was to be paid, depended also upon future conditions. The thing to be sold and the price to be paid were each alike dependent upon subsequent events, and the contract was therefore executory and must be treated, not as a deed into which no unexpressed conditions can be implied, but as an executory contract, the interpretation of which is open to clear and reasonable implications."

Ohio. *Sloan v. Furnace Co.*, 29, 568 (1876). The words, "reserving all the minerals underlying the soil," in the granting clause of a deed for conveyance of land, constitute an exception of the minerals from the operation of the grant; the fee thereto remains in the grantor.

Edwards v. McClurg, 39, 41 (1883). A bargain and sale of all the coal lying and being under certain premises in consideration of the payment of thirty cents per ton on all coal mined, grantee to mine at least three thousand tons annually, with the provision that he shall have the right to abandon the contract at any time when he should determine, in his judgment, that the coal in quantity, quality, and condition was no longer minable with economy and profit, is not a mere license, but passes absolutely to the grantee the fee of all the minable coal, so that no interest therein remained in the grantor which might be made the subject of a mortgage.

Newark Coal Co. v. Upson, 40, 17 (1883). A contract to sell and convey coal under a tract, and a grant of exclusive right to test, open, and remove said coal, to construct railroads and necessary buildings, passes title to the coal, with full right to enter and remove the same. It is not merely executory.

Pennsylvania. *Offerman v. Starr*, 2, 394 (1845). A lease of the right to mine and take away coal from a mine is a lease of the mine. "The words are: 'The said party of the first part, for and in consideration of the rents and covenants hereinafter mentioned, to be paid and performed on the part of the said party of the second part, hath demised, leased, and let unto the said party of the second part, the right to mine and take away coal from the Salem vein,' etc., and a distinction is attempted between a grant of license to work a mine and a grant of the mine itself; which, however, if a distinction at all, is a very thin one. A right to use a mine necessarily implies a right to possess it; and a grant of the use and possession, in consideration of something to be rendered, is exactly what constitutes a *lease of the thing to be possessed*."

Logan v. Washington Co., 29, 373 (1857). Where the owner of coal land has sold the coal under his land to another, the owner of the land and the owner of the coal are each subject to a tax on real estate according to their several interests. But a higher value must not be put upon the two interests, taken separately, than would have been if both had continued in the same person.

Caldwell v. Fulton, 31, 475 (1858). Coal and minerals in place are land, and may be conveyed as such. One man may own the surface and another the minerals; both are corporeal hereditaments; livery of seisin in this State being supplied by deed and registration. Minerals may be conveyed by words descriptive of the entire usufruct or dominion thereof. A conveyance by A. of a part of his land to B., and also "the full right, title, and privilege of digging and taking stone coal to any extent B. may think proper to do or cause to be done under any of the land now owned or occupied by the said A.," passes the entire ownership to the coal under all of the land owned at the time by A., and not a mere license or servitude.

Harlan v. Lehigh C. & N. Co., 35, 287 (1860). A. and B. let and

demised to C. the right and privilege to mine and take away coal from R. and S. veins and any other veins, and Q. vein in the land of the lessor, to have and hold the right and privilege for three years. This is a grant of an interest in the land, and not a mere license to take coal.

Caldwell v. Copeland, 87, 427 (1860); s. c. 78 Am. Dec. 436. Mines are lands, and subject to the same laws of possession and conveyance. Title to mines, distinct from the title to the surface, may be made out by documentary evidence, or under the Statute of Limitations.

Brown v. Corey, 43, 495 (1862). Proceedings may be had against an owner of a stratum of coal as contradistinguished from the owner of the surface to obtain an underground right of way under the Lateral Railroad Act.

Pennsylvania Salt Co. v. Neel, 54, 9 (1866). A grant for a sum certain of "the privilege of digging stone coal and penetrating the hill under my land . . . and taking out coal anywhere within the course or bounds of my line . . . reserving only the privilege of taking out coal for my own fuel," is a severance of estates passing the coal to the grantee.

Briggs v. Davis, 81½, 470 (1875). "All the coal in my lands to be kept and worked as a whole for the equal benefit of all my children during their lifetime," "and if any die without issue, the share to go in equal parts to any surviving children and their lawful surviving children." The children took a life estate in the profits of the coal land, the trust to last only to death of last survivor, after which children of deceased sons and daughters could take a fee in the coal, if any remained. There was not a perpetuity.

Sanderson v. Scranton, 105, 469 (1884). A perpetual lease of all the coal beneath the surface of a certain tract, except certain specified portions necessary for support of buildings erected on the surface, with the right to mine the coal and remove the same, the lessee paying therefor a certain sum per ton mined, in monthly payments, but for not less than sixty-five thousand tons each year, with provisions for distress and forfeiture for non-payment, is not a mere lease, but a sale of the coal. The grantee owned the coal in the ground, and not merely what he mined and removed. A tax levied upon the land having been apportioned by the assessors between the surface and the coal, the surface owners were not liable for that portion of the tax levied upon the coal. A provision in the lease that the lessee should pay all imposts and taxes on the coal mined under the lease has no importance in the determination of this question.

"It is one of the essential properties of a lease that its duration shall be for a determinate period, shorter than the duration of the estate of the lessor; hence the estate demised is called a 'term,' and necessarily implies a reversion. If the entire interest of the lessor is conveyed, in the whole or a portion of his land, the conveyance cannot therefore be properly regarded as a demise, but as an assignment."

"It is certainly true that a lease, properly so called, always conveys an interest in land, and in this respect it is to be distinguished from a mere license; but where that which purports to be a lease conveys the whole interest of the lessor, it differs in no respect from a sale."

D., L. & W. R. R. Co. v. Sanderson, 109, 583 (1885). Same instrument as in *Sanderson v. Scranton*.

"Where it is clear that the owner of a tract of land grants *the right to take all the coal beneath the surface*, and the grantee obligates himself to mine and remove all of said coal, and to pay a certain price per month for all coal mined, not less than a named quantity to be mined and paid for every year, the contract to be binding until all the coal under the tract is mined, and the rights, covenants, and obligations are binding on the parties, their heirs and assigns, and executors or administrators, *there is an actual sale of the coal*. It is none the less a sale if the parties called the deed a lease, and styled themselves lessor and lessee, and contracted that in case of non-payment of the 'royalty' the grantor should have the right of distress, or at his option the right to forfeit the grant. A deed on such terms is not a lease at will, nor for a term of years, nor for life. It cannot be limited to the life of the grantee; for should all the coal not be mined at the time of his death, his rights and obligations do not die with him.

"Leases are generally for a term of years. If for a long term, as a hundred years, though of greater value than if for the life of the grantee, the estate is inferior. The entire body of coal under a tract of land may be embraced in a lease, and the term be so long that in all probability the lessee will mine the whole of the coal. Yet a term of years is a chattel, — a transient interest in the land. A lease for the life of the lessee vests in him a freehold. A lease of a mine, whether for a term of years or for life, implies the possibility, if not the probability, of its reversion. That the mineral may be partly or wholly exhausted before the end of the term is a result involved in the contract. It is not pretended that the instrument in question is a lease for life. No particular period is named for the duration of a tenancy. Then, if it is a lease, the tenancy is from year to year. Such tenancy is contrary to the plain intent. The subject of the grant is coal, nothing else, save some necessary incidents for mining; and when the grantee shall have performed his covenants *there can be no reversion.*"

Hope's Ap., 29 W. N. C. 365 (1886). Coal *in place* is land. The grant to mine coal in the land of the lessor and remove it, although the instrument may be called a lease, is a grant of an interest in the land itself, and not a mere license. A grant of all the coal in a certain seam, together with the right to mine, etc., "the entire amount or body of said coal" for ninety-nine years for a sum certain, payable in instalments, is a *sale of the coal*.

Weakland v. Cunningham, 7 Atl. Rep. 148 (1886). A reservation in a conveyance of land, "excepting the profits of one-half of all the stone coal, and of all the other kinds of minerals which may be discovered at any time hereafter," is a reservation of the *corpus* of all such coal and mineral *in place*.

Montooth v. Gamble, 123, 240 (1888). By articles of agreement a coal plant, including chutes, tipples, sidings, and cars, with the coal under a tract of land, was sold and conveyed, the privilege of mining and removing the coal to continue not longer than a specified term, the coal then unmined to revert to the vendor.

This was a sale and conveyance. It was of all the coal, and was exclusive in the vendees.

Rankin's Ap., 1 Monaghan, 308 (1888). One who has a life interest in the coal, but no interest in the surface, may mine the coal to exhaustion through open mines.

(The same rules apply as in case of life estate in lands with coal or other minerals underlying them.)

Fairchild v. Furnace Co., 128, 485 (1889). A written contract, though not under seal, by which, in consideration of a certain sum, A. agrees to convey to B. the right and privilege of digging *all the ore* on A.'s land, is in equity, after payment of the consideration, *the equivalent of a conveyance of the title to the ore in fee*.

Lillibridge v. Lackawanna Coal Co., 143, 293 (1891). Plaintiffs "granted, demised, leased, and to mine-let" to defendant "all the merchantable coal, together with the sole and exclusive right to remove the same, under" a certain tract of land, "to have and to hold the coal in and under the said land . . . until the exhaustion thereof under the terms of this indenture." The defendant covenanted to prosecute the business of mining energetically, to pay a royalty on coal mined, but on at least fifteen hundred tons a year.

Held, (1) The above indenture was an absolute conveyance of the coal as land to the defendant.

(2) The defendant acquired together with the fee in the coal the ownership of the space enclosing it, and the right to use it for any purpose it might see fit, and consequently to carry coal from the adjoining tract through it.

Green, J.: "In the opinions delivered in the foregoing and other cases we have emphatically decided that the coal or other mineral beneath the surface is land, and is attended with all the attributes and incidents peculiar to the ownership of land. We have held the mineral to be a corporeal and not an incorporeal hereditament; that the surface may be held in fee by one person and the mineral also in fee by another person; that the mineral may be subject to taxation as land, and the surface to an independent taxation as land, when owned by a different person; that possession of the mineral may be recovered by ejectment, and title may be acquired by adverse possession under the Statute of Limitations, though not by prescription, because it is not an incorporeal right. In short, we have for nearly half a century judicially regarded the ownership of mineral, where it has been properly severed from the surface, as the ownership of land to all intents and purposes."

Kingsley v. Hillside Coal & I. Co., 144, 613 (1892). A deed by which the grantor grants, bargains, sells, aliens, enfeoffs, releases, conveys, and confirms to the grantee, his heirs and assigns, a tract of land, the possession thereof to extend only to the use of the land as a coal field, with power to search for coal, mine and remove it when found, etc., these privileges to extend to one hundred years, the consideration of which was \$150 and the satisfaction of a certain judgment, constituted a sale of the coal and not a lease.

"These instruments conferred on Meredith and his successors in title an exclusive right to mine and sell all the coal in the tract described, subject to the exercise by the grantor and his vendee of the

privilege aforesaid. It is obvious that the parties to them intended a sale of the coal. The sum paid for the mine right was the price of the coal *in place*, and in London's receipt on the first contract it was called 'purchase-money.' A grant of a mine right under which the grantee is authorized to remove and sell, for his own benefit, all the coal contained in the tract described, is a sale of the coal, and not a lease of it. It is contended, however, that the creation of a term within which the right is to be exercised clearly stamps the transaction as a lease. In *Hope's Ap.*, 29 W. N. 365, the instrument was in form a lease for a term of ninety-nine years, and it was held to constitute a sale of the coal, with a definite term in which to mine and remove it. In *Montooth v. Gamble*, 123 Pa. 240, the agreement was regarded as a sale of coal, to be mined and removed within seven years, although it contained a provision that the coal unmined, if any, at the end of the term should revert to the vendor. Where a fair interpretation of the written agreement shows that a sale was intended by the parties, and a right to mine and remove all the coal is conferred by it, in express terms or by plain and necessary implication, it will constitute a sale, notwithstanding a term is created within which the coal is to be taken out. We hold that the writings in this case constituted a sale of the coal to be mined within the term stated therein."

Lazarus' Est., 145, 1 (1892). A grantor "demised and leased" all the anthracite coal under certain lands, with the privilege of mining and removing the same; the grantees "to have and to hold the said anthracite coal . . . for and during the term of ninety-nine years," and to pay a fixed rate per ton for coal mined, but not less than a stipulated sum each year.

The transaction constituted a sale of the coal, giving to the grantees an absolute and exclusive right to take all the available coal in the tract described; and it was immaterial that the consideration, beyond the stipulated sum payable in any event, was regulated by the rate per ton for the coal which might be mined.

"Nor is it material that no coal has been nor may be mined within the term specified. The grantee has the absolute and exclusive right, under the conveyance, to mine all the available coal contained in the tract described, and it rests with him alone whether or not there shall be a reversion. If he should exercise his right within the term, the coal will by severance have become absolutely his, and his grantor will have received its equivalent in cash as in the case of an ordinary sale; if not, his inaction will simply amount to a voluntary forfeiture of such rights." "The transaction here constituted a sale of the coal conditioned upon its being removed within the period specified; and the court below was therefore in error."

Plummer v. Hillside Coal & Iron Co., 160, 483 (1894). An instrument in writing provided as follows: Samuel Callender doth lease and to farm-let to Thomas Meredith all the land that he now holds, and the lease is to continue for the term of one hundred years from this day. Possession of the leased premises shall extend only to their use as a coal field. The lessee shall have full power and possession to search for coal anywhere on the leased premises, in any manner he may think proper; to raise the coal, when found, from the beds; to

enter and carry away coal; and to sell the same for his own benefit and profit. He may occupy whatever land may be useful or necessary as coal yards, and in case it may prove necessary for securing the full enjoyment of the premises aforesaid as a coal field as aforesaid, then the said Samuel covenants and agrees to execute such further writings as counsel learned in the law may deem proper. The purchase-money or price of the coal was fixed at two hundred dollars. If the coal proved abundant and of a given thickness, then another hundred dollars was to be paid. In addition to this sum one dollar per annum was to be paid as a rent. *Held*, that the instrument contemplated a sale of the coal under the leased premises at a fixed price, to be increased one hundred dollars if the quantity of coal reached the proportion described in it.

Powell v. Lantzy, 173, 543 (1896). The owner of the mineral estate is neither a tenant in common nor a joint tenant with the owner of the surface; each has a separate estate.

A sale of unseated lands for taxes which were assessed before the severance of the title to the surface from that to the minerals, and a purchase of the whole by the owner of the surface, passes a good title to the whole as against the owner of the minerals. No relation of confidence exists between the owners of the different interests which gives rise to a duty which equity will enforce through the medium of a trust.

Massot v. Moses, 3, 168 (1871). A. being seised in South Carolina. fee of a tract of land, in consideration of \$2,000 granted to B. "the right and privilege of entering in or upon, by himself or by his agents, all or any part of said tract," for the purpose of searching for minerals or fossil substances, conducting mining operations to any extent he may deem advisable, and for working, removing, selling, and appropriating "to his own use for the term of ten years from," etc., "all phosphates that may be found by any person or persons, or contained in any part of said tract," provided that B. "shall not at any one time during said term engage in working over one-third part" of said tract. "Such one-third part to be selected by him as often as he may desire." The deed also contained grants to B. of the right to cut and remove trees and wood, such trees and wood to remain the property of A., and of a general right of way, with the privilege of constructing railroads and other roads and machinery to be used in the transportation, manufacture, etc., of said substance, with the right to remove the same at the expiration of the term. *Held*, that this was a demise of the phosphate beds for the term of ten years, with the exclusive right of raising, selling, disposing of, and manufacturing all phosphates found during the term, and that B. had the right to divide his interest and convey part of it to others.

"The expression, 'that may be found by any person or persons, or contained in any part' of the land, distinguishes this case from *Lord Mountjoy's Case*, Litt. 165, and shows an intent to convey an exclusive right, and not one in common merely with the grantor; and this construction is aided by the fact that the consideration was an entire sum demandable at the delivery of the deed, and intended as compensation for the rights granted.

"Unopened veins or beds of minerals contained in and below the

surface of the soil may be demised as if they were separate pieces of land. A grant for a term of years for the exclusive right to search for, take, sell, and dispose of, to the grantee's use, all phosphates found during the term in a designated tract of land, is a demise of ore beds or veins of phosphate contained in the land."

Virginia. *Cowan v. Radford Iron Co.*, 83, 547 (1887). An agreement by which the owner of land sells to another all the minerals under the land, with the usual mining rights and privileges, which are described to be the right to enter at any time with workmen, machinery, etc., and mine and carry away the coal, to use so much of the surface as is necessary for the operations, to erect the necessary buildings and construct roads, and to use water; and the grantee agrees to pay quarterly fifteen cents a ton for all iron ore so taken, and is given the privilege of removing his machinery, buildings, fixtures, and improvements at any time, creates a tenancy at will.¹

Lee v. Bumgardner, 86, 315 (1889). A tract of land having been divided into separate parcels, No. 6 was conveyed to plaintiff, and No. 11, upon which was a furnace called Cotopaxi, to defendant. In the deed to No. 6 was this language: "Subject to the right of the owners of Cotopaxi furnace to raise ore from a bank or banks on lot No. 6." "To use the road leading to said ore bank or banks for hauling ore from said banks to said furnace, which rights were reserved at the time of the sale, and are hereby reserved to the owners of the said furnace." Held, that the iron ore under the land remained the property of the vendors, who had a corporeal interest therein. That interest being corporeal could not be appurtenant to the furnace property, but a conveyance by the vendor to the defendant subsequent to the bringing of this action to restrain mining by defendant was a defence thereto.

Lacy, J.: "The grant of the iron ore in the lands of the vendor is a grant of the substance, is a corporeal hereditament, and is exclusive. But the right to take ore from the lands of the vendor, being granted for a specific purpose or in a limited quantity, is an incorporeal hereditament and is not exclusive. So the conveyance of the right to take ore under the grantor's tract of land is a conveyance of the entire ownership of the ore in place beneath the grantor's land, and the minerals beneath the surface of land may be conveyed by deed distinct from the right to the surface, and is a corporeal hereditament that passes by deed."

Barksdale v. Parker's Adm'rs, 87, 141 (1890). In partition of real estate of a decedent, in order to effectuate a contract of the devisees, the commissioners were ordered not to include the land and mine already leased to certain parties, nor to take into consideration in estimating the value of the land any minerals on any part thereof, the mineral rights in the whole to be retained, and held as the undivided property of the devisees, subject to the further order of the court. The division having been made in accordance with this order, and the commissioners' report confirmed by the court, it was held that the devisees had an estate in fee in the minerals, a corporeal hereditament, and not an easement, and that the purchaser of the part of the land allotted to one of the devisees acquired no right to take the minerals.

¹ See p. 175.

II. LEASE OF LAND WITH MINING RIGHTS.¹

As has been seen, a true leasehold interest in minerals *in place* cannot exist. If an estate in them passes, it is a fee. But a leasehold may, of course, be created in the land itself, and the nature of that estate is not changed by the addition, as an appurtenance, of the right to take minerals during the term. Such a lease raises an estate for years in the land. The tenant's possession of and property in the minerals are the same as his property and possession of the soil. But he has an appurtenant right to remove the minerals under which the absolute ownership of the minerals vests in him upon removal.²

Such leases are of course subject to the same rules as other leases of real estate, with the important exception that mining, even from unopened mines, is not waste, but the object, or one of the objects, of the tenancy.³

Illinois. *Gartside v. Outley*, 58, 210 (1871). This was a lease or grant of land for an indefinite period, with leave and permission to take, under certain specified conditions, all the coal contained in the land, with a provision for forfeiture for non-compliance by lessee. Of this lease the court said it would expire by its own limitation when the coal became exhausted.

"The counsel does not define the nature of the estate which he insists is created, except to indicate that the grant is in the nature of a 'servitude,' to which the company's land was subject for an indefinite period. We think the fair construction to be given to that instrument is that it is in the nature of a lease, and creates only the relation of lessor and lessee. If, however, it can be said that it conveys the fee in the land, with a perpetual reservation of rent, we do not see how that view could aid the claim of the appellees."

Kansas. *Franklin Co. v. Coal Co.*, 48, 518 (1890). A lease of land by the owner, who is a married man, and occupies the same with his family as a homestead, with the privilege of prospecting for gas, coal, oil, and other minerals at the lessee's pleasure, and to erect derricks, engine-houses, and buildings necessary in mining, etc., and of excavating mines, and piping oil and gas, is such an alienation of the homestead as, under sec. 9, art. 15, of the Constitution, requires the wife's consent.

Missouri. *Hobart v. Murray*, 54 Ap. 249 (1898). See this case on page 40.

¹ See pp. 15 *et seq.*

² See, however, *Harlow v. Lake Super-*

³ In Wisconsin, this subject is controlled by statute. *Ann. Stats. 1889, sec. 1647, p. 987.*

rior Iron Co., 36 Mich. 105, *ante*, p. 16.

New Jersey. *Ackerman v. Hartley*, 4 Halst. Ch. 476 (1850). A. leased to B. a certain lot, with the privilege of working the quarry thereon, for \$250 a year, and further, by the same lease, agreed that he should have the use of all of A.'s right in an undivided quarry on the adjoining lot. B. did not work the latter during the term. When the lease expired no new lease was made, but B. continued to quarry on the former lot at a rent of \$200 per year. B. was held to have no interest after the expiration of the lease in the adjoining lot, and he was enjoined from mining thereon.

Shaw v. Wallace, 25 Law, 453 (1856). A contract to raise ore, not less than a certain amount per annum, from the mines on certain land, for which the contractor was to receive a certain sum per ton, to have tools furnished, and the use of the land and buildings, may be construed as a lease of the surface, the lessee paying the rent by labor in the mine. The contractor had the right of exclusive possession of the land and mines, and might maintain trespass against the owner for entering and mining.

North Carolina. *Patton v. Axley*, 5 Jones Law, 440 (1858). An agreement leasing land for the purpose of examining for minerals at a royalty, payable quarterly, the lease to continue so long as lessee deems it proper to operate, and to be forfeited in case of abandonment of operations for one year, is a lease from year to year.

New York. *Baker v. Hart*, 52 Hun, 363 (1889). A lessee of lands, with all the exclusive rights to the premises and to quarry stone, has an interest in all the stone in the quarry, and may maintain trespass against an adjoining owner who quarries and takes out stone from the land. His property is not limited to the stone which he himself takes out.

Pennsylvania. *Moore v. Miller*, 8, 283 (1848). "In estimating the language which constitutes a lease, the form of words used is of no consequence. It is not necessary that the term 'lease' should be used. *Whatever is equivalent* will be equally available. If the words assume the form of a license, covenant or agreement and the other requisites of a lease are present, they will be sufficient. Co. Litt. 45 b; Bac. Abr.; tit. Lease K."

An agreement that Miller should enter and dig for ore, build houses, etc., he to pay as a compensation to the owner of the land fifty cents for every ton of ore, was, in substance and fact, a lease. But whether it was only a tenancy at will or constituted a lease for a year, was a question of fact to be determined from the evidence; and as the evidence was *in pais* and the alleged lease by parol, it was a fact properly referable to the jury.

Sheets v. Allen, 89, 47 (1879). A parol agreement that a person may enter on the land of another, dig ore, erect buildings, etc., for a consideration amounts to a lease. So of a lease of land with the right to dig clay.

"In the mining districts leases of lands for purposes of taking ore, coal, or petroleum are common, wherein the tenants are restricted to the use of only so much of the surface as necessary for mining purposes, with right in the lessor to use the surface as he chooses, save

that he may not interfere with the rights of the lessee. Frequently the lands are unoccupied for any purpose other than the mining, and frequently they are occupied by the lessor for agricultural or other uses. The actual possession of the tenant, carrying on his mining operations, is notice of his interest to a third person as fully as is the tenancy of a dwelling-house. And if the lease is for a term not exceeding three years, it is valid, though not in writing. A parol agreement that a person shall enter on the land of another, dig ore, erect buildings, etc., and pay fifty cents a ton for all ore removed, amounts to a lease. *Moore v. Miller*, 8 Barr, 272. Like principles apply to a lease of land with right to quarry minerals or dig clay. The right of a tenant in possession, under such a lease, is not extinguished in favor of a purchaser who knew the fact."

Brown v. Beecher, 120, 590 (1888). A demise of land for a term of years, "with the sole and exclusive right and privilege during said period of digging and boring for oil and other minerals, and of gathering and collecting the same therefrom," conveys an interest in the land, a chattel real, but none the less a chattel.

Ganter v. Atkinson, 35, 48 (1874). Agent of owner of Wisconsin. land by verbal contract gave plaintiff the sole right to mine ore in a certain part of it upon the following conditions: Plaintiff was to begin work at the bottom of a hole already sunk about midway between the north and south boundaries of the land, and about two hundred feet from the east boundary, and was to run a drift quartering to a point on the east boundary line a little south of southeast of said hole. He was to have the exclusive right to work and take out all ore found in the drift or in the openings or crevices between the line of the drift and the east boundary line of the land. He was also to have the exclusive right to take ores out of or to mine upon the triangular piece of ground bounded by a line drawn directly eastward from the said hole to the east line of the forty, by said east line, and by a line between said hole and the point where said drift was to strike the east line. In consideration, plaintiff was to pay one-eighth of the ores which he might take out. It was the intention to give plaintiff a written lease to mine upon said land with rights as above, but this was neglected. This created something more than a mere license. It is not distinguished from a parol lease with an exclusive right to search for lead ore and prosecute mining operations. It gave the plaintiff an interest in the land, and property in the minerals which he should find within the specified limits. He had a right of action against a trespasser who took ore within these limits. His interest was a lease from year to year within the Statute of Frauds.

III. INCORPOREAL RIGHTS TO MINERALS.

The interest in the minerals underlying land often consists in rights to take the minerals, of greater or less extent, but unaccompanied by any property in the minerals *in place*. These rights are classified as licenses — of which the next section will treat — and as incorporeal hereditaments or rights to minerals.

These rights, though often spoken of as easements, are not truly such, as their enjoyment consists in the consumption of the subject of them. Though they carry with them certain easements necessary for their use and enjoyment, they have been considered as really analogous to rights of common in gross. They are not, however, true commons of turbary, for they are without stint, the dominant tenant not being limited to taking out what he may need for his own consumption.

An incorporeal hereditament to mine, *unlike a corporeal right, is not exclusive of the right of the owner of the servient tenement*, and in construing a grant of mining privileges their nature depends upon the intention to make them exclusive or otherwise. This seems to be the test in determining between corporeal and incorporeal rights.

On the other hand, being, as they are, interests in the land, and not a mere permission to take minerals from the land, incorporeal rights differ from licenses in that they are irrevocable; and the grantee is liable for rent whether he has exercised his right or not, unless, of course, the rent is a mere royalty depending upon the extraction of minerals.

These rights, moreover, are indivisible, but they may be assigned as a whole. Ejectment will not lie for them. They may be appurtenant to another piece of land, as, for example, to a furnace property.

Incorporeal hereditaments, at common law, lie in grant, and may be conveyed by deed of grant only. Incorporeal rights to mine are of course subject to the rules governing incorporeal hereditaments. generally, and, generally speaking, a deed is necessary to pass such an interest. An attempt to do so by parol would at most amount to a license.

The grantee has no title to the minerals themselves until they have been taken out; he has no property to them in the ground. While they are in the land, his interest is a right to take them out. Those remaining in the ground belong to the owner of the ground. So these incorporeal rights to mine are sometimes described merely as *mining rights*, though that term may include licenses and the rights of the owner of the minerals.

The different courts, in describing incorporeal rights to mine, have variously, and at times simultaneously, designated them as "incorporeal hereditaments," "liberties," "privileges," and

"licenses." Necessarily confusion has resulted. Most of the courts have followed the lead of those of Pennsylvania; but in the New Jersey cases, agreements by which a party is to have the right and privilege of mining on certain land are distinctly treated as licenses *with which an interest is coupled*.

There is no substantial difference between this interest and the incorporeal rights described in the Pennsylvania cases. The difference in nomenclature seems to have had its rise in the first American case in which the subject was given extensive consideration. In *Grubb v. Bayard*, in the federal court of the circuit which embraces both Pennsylvania and New Jersey, the estate in question was described by the court both as an incorporeal hereditament and as an irrevocable license. This case is cited as authority for the decisions which follow in both of the States mentioned, the latter term being persistently used in New Jersey to describe what is likewise held to be an incorporeal hereditament in Pennsylvania.

The language of the court in *East Jersey Co. v. Wright* indicates that it is the purpose to distinguish between an incorporeal hereditament and a license coupled with an interest. If there is such a purpose, it is submitted that this case stands alone. The distinction is between a naked license and an incorporeal hereditament, the latter being an interest in the land. When, however, by the terms of a license, an interest is coupled with it, there is nothing to distinguish it from an incorporeal hereditament. Licenses proper will be considered in the next section.¹

Rutland Marble Co. v. Ripley, 10 Wall. 339 (1870).
United States. R. and B. being co-tenants of a tract of land, the former released and quitclaimed to the latter, reserving "the right to enter upon and take possession of the said twenty-one acres for the purpose of digging, quarrying, and carrying away *all the marble he or they might want*, according to the stipulations and conditions of a contract that day made and concluded between the said R. and B., in case the said B., etc., should refuse to fulfil the conditions and stipulations of the said contract." The contract referred to was to quarry and deliver marble to R. Strong, J.: "Neither the contract nor the reservation in his deed gave him a corporeal interest in the marble *in situ*. It was not a grant to him of the marble, or a grant of the right to quarry and take it all. If his interest was real in any sense, which may be doubted, it was incorporeal. Of course it was not

¹ In addition to cases here cited, see those collected below under Div. V., B., this chapter.

exclusive of the right of the owners of the land to take marble on their own account *ad libitum*." *Lord Mountjoy's Case* cited. "Other decisions asserting the same doctrine are at hand. *Caldwell v. Fulton*, 31 Pa. 475; *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Pa. 241; *Gloninger v. Franklin Coal Co.*, 55 Pa. 9. In all of them the covenants ran with the land. The grants were of undoubted real interests. They contemplated a perpetual supply to the grantees as plainly as it was contemplated in this case. The rights of the grantees were not limited as here to any defined quantity, and yet it was held they did not interfere with the right of the grantor to take ore, coal, etc., from the property out of which the incorporeal interests issued, and to take it without stint."

Smith v. Cooley, 65, 46 (1884). The owner in fee of a California tract of land granted to another an interest therein, describing it as "an undivided third interest in a certain piece of mining ground," described by metes and bounds, "together with the water rights, reservoirs, and tail-race belonging to the same, and it is expressly conditioned that this instrument conveys no other rights except a mining right on the premises above to the said party of the second part, his heirs and assigns." *Held*, the grantor could not maintain partition against his grantee. "A mining right upon a specified piece of ground is a right to enter upon and occupy the ground for the purpose of working it either by underground excavation or open workings, to obtain from it the minerals or ores which may be deposited therein. By implication the grant of such right carries with it whatever is incident to it, and necessary to its beneficial enjoyment. But it did not convey the exclusive dominion of any portion of the ground so as to make the grantee a joint tenant in common with the grantor. It conveys only a particular estate or incorporeal hereditament in land of which the grantor held the general estate."

This estate is in its nature incapable of partition; it differs from a mining claim.

Gaston v. Plum, 14, 344 (1841). A., owner of a Connecticut tract of land supposed to contain minerals, by a written instrument granted liberty to B. to dig or mine on such lands, and to carry away any minerals which he might dig thereon within one year. B., by writing, assigned to C. *all* his interest, right, and privilege in the land therein mentioned, with the appurtenances and all benefits and advantage derivable from such instrument; after which B. brought a bill in chancery against A. and others for specific performance of the agreement. *Held*, that the agreement was not of a fiduciary character, or in the nature of a personal confidence so as to be incapable of assignment, nor was the interest of B. of that uncertain or contingent description that it could not on that account be transferred; and consequently that B. having parted with all his interest in the subject of the bill, it ought to be dismissed for that reason.

Kamphouse v. Gaffner, 73, 453 (1874). "A beneficial Illinois privilege in mines, as a license to work mines, can only be granted by deed." "Every license, therefore, that authorizes such acts as not only require to be performed upon the land, but which give some usufruct of the land itself, is properly a *grant of an incorporeal hereditament, and must be created and transferred by deed*."

Maryland. *Geiger v. Green*, 4 Gill, 472 (1846). O. granted to R. "the privilege of digging and moving the ore on that part of my (O.'s) place joining W. and R.'s at twenty-five cents per ton, for the privilege of ground leave, also to build a house on said land, the workmanship to cost, etc., the materials to be got on my (O.'s) land at R.'s expense." This contract confers the mere privilege of digging ore; it is not compulsory in its character; it imposed no corresponding obligation on R., who might refuse to work the mine, and O. could not oblige him to work it. It contains no mutual or reciprocal engagements, and cannot be specifically enforced in equity; consequently there was no ground for granting or continuing an injunction upon its stipulations against another to whom O. had granted a privilege to mine on the land.

Waters v. Griffith, 2, 326 (1852). In an agreement between G. and W. it was stipulated "that the said G. agrees and obliges himself to let W. have the privilege to dig for, get, and remove chrome ore or mineral from his land," etc., and "also that the said W. shall pay unto the said G. the sum of five dollars for each and every ton of ore he may obtain and remove from said land."

Held, that under this agreement, before W. could be charged with the ore which he designated to purchase, it must not only be excavated from the earth, but actually removed from the land. Some distinct meaning must, if possible, be given to every word in the contract, and the word "obtain" being sufficient to embrace all the ore that may be excavated and thrown out upon the surface without the aid of the words "remove from said lands," the latter words must mean that the ore should be actually removed from the premises before W. can be charged with it.

Massachusetts. *Stockbridge Iron Co. v. Hudson Iron Co.*, 107, 290 (1871). Plaintiff granted to defendant certain land, reserving "the right of mining on the above-granted premises, for the use of said company, an amount of ore not exceeding 7,500 tons annually, at a duty of 37½ cents per ton, including all the facilities needful for doing the same."

WELLS, J.: "The property in the mines themselves and in the ore they contained must be held to have passed to the grantee by the deed. That which is reserved to the grantor is a license to enter upon the granted premises and exercise certain rights therein for the purpose of extracting from the mines a limited quantity of the ore, and revesting in the grantor the property in that which is thus separated from the mass. But until the ore is thus separated and becomes personal property the title and legal possession of the whole rests in the grantee. The right of the Stockbridge Iron Company is an interest in the land; but it does not constitute a title to any specific part of the mines, or of the ore contained in them, either as real or personal property. Neither is it such an interest as can be made specific in any other mode than by the exercise of the privileges defined in the clause of reservation. Until then, it is undefined and inoperative." "But this right is not exclusive. There is nothing in the deed to restrict the grantee from working the mines at the same time, even to the entire exhaustion of the ore."

Michigan. *Harlow v. Lake Superior Iron Co.*, 36, 105 (1877). Owner of land leased to another the equal undivided one-half part thereof for a term of years for all the purposes of mining ore and other minerals, and for all the business of said mining, obtaining wood and erecting buildings necessary therefor, with the right to appropriate ores to his own use, with the reservation of the use for agricultural purposes of so much as was not needed for mining purposes, and an agreement not to sell, assign, or incumber without first giving lessee refusal to purchase.

Held, that this was not a lease of land, with the additional privilege of mining, but was a grant of the mining rights and privileges set forth in the lease, exclusive of other uses to which the lessee might have put the property. Before the lessee had taken possession his right was a mere incorporeal right which was not capable of enforcement by ejectment. The lease gave the lessee the right to prospect over the entire land, and open and work as many mines as he might deem proper. He might assign or convey this right to a partnership or corporation; but he could not cut it up and parcel it out into several distinct rights to be held by more than one person, firm, or corporation. The lessee's right was not exclusive of the lessor, and did not preclude the lessor from granting a like right to others.

Missouri. *Boone v. Stover*, 66, 430 (1877). An instrument in writing under seal granting permission to mine on certain land, so long as the grantees do regular mining work on the land, is a license and a grant of an incorporeal hereditament. "A license which gives some usufruct of the land itself is an incorporeal hereditament, and can only be created and transferred by deed." "As it contains a grant of a beneficial privilege in the land, it is not revocable except for breaches of covenant by the grantee." It contains in effect a covenant on the part of the grantor that the grantee, in respect to his mining privilege, shall be free from the interruption or claims of others. Such an instrument is not a lease; ejectment by the grantee would not lie for the land.

Taylor on Landlord and Tenant, quoted to the effect that a license may have the force of an incorporeal hereditament if it be valid and delivered; and if granted for a consideration, it may take effect as a covenant. "So that in effect there is in this grant a covenant that the thing granted shall not be interrupted, although the word 'covenant' is not used." See also *Desloge v. Pearce*, 38, 588 (1866), *post*, p. 70.

New Jersey. *Silsby v. Trotter*, 29 Eq. 228 (1878). Trotter's rights arose from several contracts. One gave him the right and privilege for seven years to enter into the lands for the purpose of mining, and taking therefrom ten thousand tons, etc., at least one-seventh to be mined and taken each year; he to pay \$10 a ton, expense of mining to be deducted; mining to be done properly, under direction of the engineer of the grantor, who also reserved the right to mine and furnish the ores, in which case no deduction from price was to be made; and also the right to mine concurrently with Trotter. Other contracts granted similar privileges to take out other and more ores.

"The contracts merely granted a right to take ore; no estate or

interest is granted, and therefore they simply give a license; but it is a license coupled with an interest growing out of expenditure made pursuant to its requirements, and it cannot, therefore, be revoked at the pleasure of the licensor. The authorities are agreed that a license to dig and take ore is never exclusive of the licensor, unless expressed in such words as to show that that was the intention of the parties. Where the license simply gives the licensee the right to dig and take ore, the licensor may take ore from the same mine at the same time, and also grant permission to others to exercise the same right." Citing *Mountjoy's Case*; *Chetham v. Williamson*, 4 East, 469; *Grubb v. Bayard*, 2 Wall. Jr. 81; *Funk v. Haldeman*, 53 Pa. 229; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290. The licensee also acquires no right to the ore until it is severed from the freehold.

Moreover, a licensee who constructs a tunnel for mining purposes, under authority of the license, with his own funds, for which he is to be reimbursed out of the licensor's share of the profits of ore mined for their joint benefit, will be held to have an exclusive right to the use of the tunnel so far as is necessary to enable him to get the ore which he had a right to take, provided he uses reasonable diligence. But where the licensee's operations do not require such exclusive use, the licensor or his grantee is entitled to use the tunnel, but his right is subordinate to that of the licensee.

Manganese Co. v. Trotter, 29 Eq. 561 (1878). In the contract, which in the last case was construed to be a license, the grantor reserved the right to mine and furnish the zinc ore to which the grantee was thereunder entitled. It was accordingly there held that if the licensor elected to use his reservation to mine and furnish ore to the licensee, then the licensor would have the right to the exclusive use of tunnel in dispute.

The court modified its order for the purpose of protecting the licensee's right to certain *franklinite* which was being taken out at the same time with the zinc. The principle of the former case, however, remains undisturbed by this case.

East Jersey Co. v. Wright, 32 Eq. 248 (1880). A license confers a right of property in the minerals only when they have been severed from the freehold, while a lease is a conveyance of an actual interest in the thing demised.

An agreement that R. and his heirs, administrators, executors, and assigns shall have the exclusive right and privilege of raising and removing ore from certain land, together with the privilege of entering for that purpose and of erecting machinery, in consideration of twenty-five cents a ton for all good ore sold and removed by the joint consent of grantor and grantee, is a license. It is exclusive; but the licensee having made no expenditure under the license, it was determined by the conveyance of the land by the grantor of the license.

"The language, it will be observed, is purely promissory or executory. 'It is agreed that R., and those who succeed to his rights, shall have the exclusive right and privilege,' etc. Nothing passes presently as under technical words of grant '*dedi et concessi*.' To constitute a grant it is not indispensable that technical words shall be used, but they must be words which will manifest the same intention. No

such words are found here. The language of this instrument is equally inefficacious to manifest a purpose to make a demise. The technical words of a lease are 'demise, lease, and to farm-let,' but any others signifying the same intention will have the same effect. But they must clearly show that the lessor intends to divest himself of possession, and that the lessee shall come into it." "By force of the words of the instrument under consideration, unless we attribute to them a significance much more extensive than they have in legal science, or can have in virtue of their own intrinsic force, it is plain they pass no estate or property in the lands or the minerals deposited in them. They, at most, merely gave R. authority — we may say exclusive authority — to enter upon the lands of W., and to do a series of acts there for his own profit, without passing any estate or property in the lands. Such an authorization is a license and not a lease."

A license being a personal privilege, is not assignable, is revocable at the pleasure of the licensor, and is terminated by the death of either party. But these rules do not apply when an interest is coupled with a license, or is created by an execution of it. "A license may confer a sole or exclusive right, or simply a right in common. If it simply confers a right to dig and take ore, or to work a mine, it is not exclusive, and the licensor may himself take ore from the same land or mine, or license others to do so. And when it authorizes the licensee to dig and carry away all the ore to be found in certain lands, it does not confer an exclusive right. If it be merely a license, and no estate in the property or land passed, the licensee acquires no title to the ore until he has severed it. Such a license has been adjudged to confer a privilege similar to a right of common *sans nombre*, to give a right without stint as to quantity, but not exclusive of the grantor. The authorities supporting this view will be found cited in *Silsby v. Trotter*, 2 Stew. 228. There can be no doubt that the instrument under consideration conferred an exclusive right. The licensor has expressed his intention in that respect in plain words."

"It seems to me to be incontestably true as a legal proposition, that the moment a licensor divests himself of his whole estate in the land, and his dominion over it ceases, any permission or authority granted by him to do acts upon the land, not resting in grant or demise, nor coupled with rights or equities arising out of acts done in pursuance of such permission or authority, must also cease."

New York. *Ryckman v. Gillis*, 57, 68 (1874). Defendant conveyed to S. twelve acres of land, "reserving to the said Stephen C. Gillis, his heirs and assigns, the right at all times hereafter, so long as the clay and sand may last or be used for brickmaking purposes, the right to enter upon that part of the aforesaid premises which is bounded and described as follows, to wit: . . . Containing 175 acres, and to dig and take therefrom the clay and sand that may be found thereon fit for brickmaking. Such clay and sand is to be taken for no other purpose than for brickmaking, and the right to enter upon the aforesaid part of said premises is to be only for the digging and removing of such sand and clay."

The defendant did not have title to the sand and clay as a distinct freehold, but only an incorporeal right to dig for and take away clay

and sand from within the boundaries of the land. Defendant, therefore, did not owe lateral support to the owner of the freehold, and could not be enjoined from digging out sand and clay so as to cause the adjoining land of the owner of the freehold to fall down into the excavation.

Baker v. Hart, 123, 470 (1890), reversing s. c. 52 Hun, 363. A lease which gave to the lessee "the sole and exclusive right of entering in and upon the lands . . . for the purpose of quarrying, cutting, crushing, and removing stone for the term of ten years . . . but not to hold possession of any part of said lands for any other purpose," passes an incorporeal hereditament, "a right to take stone from the land which became theirs only upon its actual severance." What they did not sever remained the property of the owner of the fee.

Where, therefore, a stranger trespassed upon the land and quarried and took away stone, the "lessee" could not, as its owner, recover its value, though he might recover damages if he could prove that the trespasser so diminished the supply of stone that enough did not remain to satisfy his right.

The doctrine that a tenant for years or life is answerable to the remainder-man for waste has no application, there being no tenancy here.

Pennsylvania. *Grubb v. Guilford*, 4 Watts, 223 (1835). Same deed as in *Grubb v. Bayard*, below. This easement or right is not appurtenant to the land conveyed, and would not pass by a sheriff's sale thereof.

This right to dig, etc., is an incorporeal hereditament, not a license. It is an easement granted for a valuable consideration, with no intention that it should be appurtenant to the land conveyed.

Grubb v. Bayard, 2 Wall. Jr. 81 (1851). D. F., by deed, reciting his title to three hundred and two acres, bargained and sold to B. twenty acres, with the following covenant as to the balance: "And the aforesaid David, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree to and with the aforesaid William, his heirs and assigns, that he the said William, his heirs and assigns, shall and may from time to time, and all time hereafter, dig, take, and carry away all iron ore to be found within the bounds of the said David's tract of land containing two hundred and eighty-two acres, provided he, the said William, his heirs and assigns, pay unto the said David, his heirs or assigns, the sum of sixpence per ton for every ton," etc. Defendant, assignee of grantor, mined on the said tract of two hundred and eighty-two acres. Plaintiff, purchaser of ninety-four ninety-ninths of interests of grantee's representatives, brought an action on the case. And upon verdict for defendant a new trial was refused, Kane and Grier, JJ., filing opinions in which the former speaks of the privilege granted by the deed as "a right of common in gross *sans nombre*," the latter treating it as an irrevocable license.

Subsequently, as a whole court, they agreed upon these propositions:

"1. For the purpose of the present decision we *assume* that the covenant in question contains a *grant in fee* to Bennet and his heirs for a sufficient consideration *to be paid*.

"2. We decide that the thing granted is *not* the iron ore contained in the land of the defendant, but an incorporeal hereditament, a right, a license or liberty, well described in the plaintiff's declaration as 'a right and privilege to dig, take, and carry away' *all or any* iron ore *to be found* in the land of the defendant. It is a license irrevocable, which may be demised for a term of years, or assigned in fee.

"3. That until the grantee or his assigns exercised this privilege by *digging, taking, etc.*, iron ore *found* in the land, they had no property in the ore that would support an action of trover for the same.

"4. That the effect of the word '*all*' in this grant is not to give an exclusive right *as against the grantor*. It describes the *extent* to which the license may be exercised, *not its exclusiveness*. It is a grant of a right to take ore without stint, and is aptly compared to a right of common in gross *sans nombre*, which does not exclude the lord or owner of the land out of which it is granted.

"5. That such a right is *indivisible*, and unless the plaintiff as assignee is clothed with the *whole*, he has *nothing*, and cannot support this suit as against the owner of the land."

6. That *Lord Mountjoy's Case* is directly in point, and rules this case.

Johnstown Iron Co. v. Cambria Iron Co., 32, 241 (1858). A grant of the privilege of raising ore on the land of the grantor, at a certain price per ton, is an incorporeal hereditament, and not a mere license revocable at the grantor's will. Such a right is not exclusive in the grantee, but to be enjoyed in common with the grantor, and a bill in equity by the former to restrain the latter from digging ore will be dismissed.

Clement v. Youngman, 40, 841 (1861). A., by deed, granted to B., his heirs and assigns, in consideration of one dollar, the exclusive right and privilege of searching for, digging, raising, and carrying away from certain land "all the iron ore and limestone on said land, and also timber sufficient to enable said mines to be worked to advantage," with right for roads, room for deposit of ore, stone, and dirt, free ingress and egress, privilege of erecting buildings necessary for operation of iron-works; B. to pay A. twenty cents for each ton of clean ore taken out. *Held*, not to pass the ownership in the ore and limestone. The intention was that the ore and limestone should be a supply to the iron-works, which it was intended B. should erect. If the deed were construed to grant an ownership in the minerals, B. might hold it without erecting iron-works; might take out the limestone without rendering any compensation to A. What B. took was an incorporeal hereditament, for which his assignee could not maintain ejectment.

"In inquiring what was granted, we must look for the general purpose of the instrument. If under the agreement the ownership of the limestone and the ore became vested immediately in Hughes, he and his heirs might hold it forever without erecting any iron-works, or rendering any compensation to the grantor. Is a construction of the instrument which leads to such results a reasonable one? Can the parties be supposed to have intended it? We think not. Some of the rights granted are confessedly incorporeal, and conditioned upon the erection of iron-works. The words of the premises in the agreement,

standing alone, may indicate an intention to transfer ownership of the stone and mineral to the grantee, but against it is opposed the significant fact that no equivalent was to be given for either the one or the other until the ore should be taken, and there was no obligation even to take it. What Hughes was to take, as well as when he was to take, was left all uncertain. In view of this it is hard to believe that the parties contemplated an immediate divestiture of ownership by one, and an acquisition by the other." Strong, J.

Gloninger v. Coal Co., 55, 9 (1867). A grant in 1808, in consideration of \$6.50 unto F., a blacksmith, his heirs, executors, administrators, and assigns forever, of "the free right to dig coal at the coal bed under the foot of the mountain on my lot, with the privilege freely to carry the coal from the said lot, as also free ingress and regress to and from said coal bed through my lands at all times hereafter," creates an incorporeal hereditament enjoyable in common with the grantor, for which or a part of which ejectment will not lie.

"The present case is not an exclusive right in the grantee to dig *all the coal*, and to any extent, and to exclude the grantor from mining also; and is, therefore, not ruled by *Caldwell v. Fulton*.¹ Such a right is not exclusive in the grantee, but to be enjoyed in common with the grantor, his heirs and assigns, and the grant is therefore an incorporeal hereditament. The right in the case before us is not exclusive in form, words, or spirit, and is simply a privilege to dig coal at a specified coal bed and carry away the coals so taken, and not interfering in any way with the right of the owner of the land to mine *ad libitum*."

Grove v. Hodges, 55, 504 (1867). An agreement by which one man sells to another the right to mine, take, and carry away the iron ore on and in the land of the former, in consideration of twenty-five cents a ton, is an executed conveyance of an incorporeal interest, and not a mere executory agreement to sell. A subsequent grantee of all the iron ores in the land took subject to this interest.

Johnston v. Cowan, 59, 275 (1868). Grant of the right and privilege to dig, mine, take, and carry away fire clay from a certain tract of land for twenty years; the grantees to pay twenty-five cents per ton, and in the event of their not taking out 1,250 tons in six months, then to pay \$150 every six months. *This is not a mere license, but a grant of a right or privilege which the parties were bound to pay for whether they enjoyed it or not.*

It was not a good defence to an action for the contract price that the defendant had never entered upon the land and had never mined any clay thereon.

Carnahan v. Brown, 60, 23 (1868). A testator, after dividing his land among his sons, further devised to them "each an equal privilege forever of the coal bank now open, and the ground on the ridge adjacent so far as may be necessary for digging and taking coal." This coal bank was on the land allotted to one of the sons. The will passed an incorporeal hereditament and an easement in the adjacent land necessary to its enjoyment. Ejectment will not lie for its interruption.

Semble, that the privilege extended to every part of the land con-

¹ See p. 44.

taining coal which might be mined through the opening designated in the will.

Coleman's Ap., 62, 252 (1869).¹ A man cannot have an incorporeal easement to dig ore in his own fee.

"Nor, as it appears to me, can it be said that these ore banks were in any sense appurtenant to the other lands comprised in the partition of 1787. The original title to them by warrants from the proprietaries on May 8, 1732, and Dec. 2, 1737, was separate and distinct from these lands. A thing corporeal cannot properly be appendant to a thing corporeal. Co. Litt. 121 b. The owner of them and the adjacent tracts might perhaps have limited the use of the ore to the supply of the furnaces erected or to be erected on the other lands, then held by them in common. There is not a word, however, in the agreement of 1787 which intimates such an intention."

Grubb v. Grubb, 74, 25 (1873). Clement and Edward owned in common "The Mount Hope Estate," which consisted of several tracts of land, and one-sixth of "three certain mine hills" known as Cornwall Ore Banks. Clement conveyed to Alfred his half of "The Mount Hope Estate," designating the particular tracts, "together also with the right, title, and interest so far as the said Alfred Bates Grubb's right under this conveyance in the said Mount Hope Furnace is interested and concerned, of them the said Clement B. Grubb and Mary Ann Grubb, his wife, to raise, dig up, take, and carry away for the use and advantage of said furnace, iron ore out of and from three certain mine hills in Lebanon Township, Lebanon County, bounded on all sides by lands of Thomas B. Coleman, deceased, and known and called by the name of the Cornwall Ore Banks, and held as a tenancy in common with the heirs of Thomas B. Coleman and James Coleman, deceased, with ingress, egress, and regress to and from the said mine hills and every part thereof, for the purpose only of procuring ore from the said Mount Hope Furnace, but for so long and for such time only as the said furnace can be carried on and kept in operation by means of charcoal."

Held, that this conveyance granted to Alfred a limited privilege to take ore, and did not convey the corporeal estate in the mine hills that remained in Clement. "Without discussing at present the distinction between an easement and a right of *profit à prendre*, we may say that the mining right of Alfred B. Grubb is clearly a privilege annexed by the deed of Clement B. Grubb to the interest he conveyed in the Mount Hope estate, and will pass with it as appurtenant thereto. That it is not a right of *profit à prendre* in gross, is manifested by the terms of the grant, for it is a right only to take ore for the use and advantage of the Mount Hope Furnace, and the right of ingress, egress, and regress is confined to the purpose of procuring ore for the furnace, and that so long as the furnace shall be operated by means of charcoal. That this is not a grant of the minerals themselves in place, is equally clear from the language of the grant, and is proved also by the cases of *Funk v. Haldeman*, 3 P. F. Smith, 229; *Huff v. McCauley*, id. 206; *Johnstown Iron Co. v. Cambria Iron Co.*, 8 Casey, 241; *Grubb v. Guilford*, 4 Watts, 223; *Brandt v. McKeever*,

¹ See p. 25.

6 Harris, 70; *Caldwell v. Fulton*, 7 Casey, 475; Washb. Easem., ed. 1871, p. 10. Not being either a *profit à prendre* in gross, or an estate in the ore itself, it must rank in that class of easements wherein a right granted out of other land is expressly annexed to land.

"A right of *profit à prendre*, which may be held apart from the possession of land, differs therein from an easement, which requires a dominant tenement for its existence."

Grubb's Ap., 90, 228 (1879). Alfred B. Grubb having acquired title to the whole of Mount Hope Furnace, claimed the right to take from the Cornwall banks, under his deed from Clement, a full supply of ore for the furnace. Clement contending that he was only entitled to a half supply, brought a bill in equity. The court dismissed the bill for want of jurisdiction.

"No question of waste is raised by this record. Waste is spoil or destruction done or allowed to be done to houses, woods, lands, or other corporeal hereditaments by the tenant thereof, to the prejudice of the heir, or of those in reversion or remainder. By the act of 27th of March, 1833, Pamph. L. 99, the provisions of the second section of the act of 2d April, 1803, restraining waste, are extended to quarrying and mining. But it has never been held that a person who is not a tenant in possession, but possessing a right to dig ores, is guilty of committing waste when he takes out more ore than his contract or his rights call for."

Grubb v. Grubb, 101, 11 (1882). C. B. Grubb brought assumpsit for the one-half of the ore taken by A. B. Grubb to supply the Mount Hope Furnace.

Held, that the defendant was entitled to the full supply. The deed should be construed most strongly against the grantor. This construction is also upheld by the circumstances surrounding this conveyance in 1845, when all those who had interests in the banks took all the ore necessary for their furnaces without accounting, the banks being practically inexhaustible for the purpose of supplying as then worked.

Jennings v. Beale, 158, 283 (1893). Defendant conveyed to plaintiff, his heirs and assigns, in trust for a firm, for a consideration of \$40,000: 1st, Five described lots of ground; 2d, All the gas from certain wells; and, 3d, "Also the perpetual right to mine, dig, and carry away coal in and from all the veins of coal in and under the following-described tracts of land," plaintiff to pay a royalty on all coal mined. This did not convey the coal absolutely, or exclude the grantor from mining. That it was not intended that the grant should be exclusive is shown by the omission to specify "all" the coal, and the fact that no time is fixed for payment of royalty, and there is no covenant or condition requiring the grantees to mine.

Algonquin Coal Co. v. Northern C. & I. Co., 162, 114 (1894). W., the owner of a tract of land, conveyed the same in 1801 to C. by a deed in which it was provided: "The said Thomas reserves for himself, his heirs and assigns, a free toleration of getting coal for their own use without hindrance or denial." The grantees of W. were held not to own the coal, but only to have a privilege to take coal for their

own use. The title remained in those who succeeded to C.'s title, subject to this privilege, and they had a concurrent right to take the coal.

South Carolina. *McBee v. Loftis*, 1 Strob. Eq. 90 (45). An instrument in writing which does not, and was not intended to, grant the soil in fee, but the use only, for the purpose of mining, is not a deed for the conveyance of the land, within the act of 1795, requiring two witnesses.

The grantee of a right of mining who by the terms of the deed is bound to surrender the right at the end of a year, if he finds it unprofitable, and who at the end of the year indicates no intention to do so, cannot have his right limited to one year.

Where, by the terms of a grant of the right of mining, the grantee is entitled to work free of expense, etc., and is in no other respect restricted, he may conduct the work in any manner he thinks proper, either by himself, his servants, agents, or assigns.

The right of mining can only be acquired by deed, and is not forfeited by non-user.

Virginia. *Reynolds v. Cook*, 83, 817 (1887). A right to quarry and remove all the limestone in a tract of land is an incorporeal hereditament, an interest or right arising out of land, and as such may, under Code 1873, chapter 131, section 5, constitute the foundation of an action of ejectment.

Lewis, P.: "It was clearly an incorporeal hereditament, first, because it was not a mere license, as was the case of *Barksdale v. Hairston*, 81 Va. 764, and in other similar cases there cited; and, secondly, because it was not a grant of an exclusive right: *Johnstown I. Co. v. Cambria I. Co.*, 32 Pa. 241; *Clement v. Youngman*, 40 Pa. 341; *Marble Co. v. Ripley*, 10 Wall. 339. Such a right has been compared to a grant of common *sans nombre*, and is therefore an interest in or a right arising out of land, and as such constitutes under our statute a foundation for an action of ejectment."¹

Wisconsin. *Gillett v. Treganza*, 6, 343 (1858). By written agreement G. bargained and sold to T. "the right of digging for lead ore on a certain range, it being a sheet dipping south and running east and west, for the sum of five hundred dollars, granting the said T. privilege of following his sheet or crevice in whatever direction it may run," etc. And T. gave to G. "all my right and interest in the said ground, save the privilege of following my crevice a sufficient thickness for the purpose of digging and making said crevice."

"The plain object and intent of this agreement appears to be not to create a property or estate in the land, not to sell the mines or minerals unsevered therein, but to sell a right, liberty, license, and privilege to work, mine, and search for lead ore upon the range therein described. T. consequently had no property in the minerals until he had found and severed them. He could not maintain replevin in the *cepit* for ore dug by another."

¹ See *Lee v. Bumgardner*, p. 50.

IV. LICENSES TO MINE.

A grant of a privilege of mining which, if in writing, would constitute an incorporeal hereditament, *if made by parol* constitutes a license, a mere personal privilege which is unassignable, is concurrent with the right of the licensor to mine, is revocable at the will of the licensor, and vests no title in the minerals until they are severed by the acts of the licensee.

It will be noticed that incorporeal rights to mine are sometimes spoken of as liberties and licenses, as in *Grubb v. Bayard*. The term seems to be used (in Bainbridge, for instance) to cover all rights to mine which create no estate in the minerals *in place*, just as the term "mining lease" has a generic sense in which it includes not only true leases, but all estates and rights in or to minerals.

The broad distinction of the classes within the genus *license* is this:—

When a right to minerals which is not exclusive of the grantor is created *by deed*, it is an incorporeal hereditament; when *by parol*, it is a true license. The one creates an estate in lands, the other a personal privilege. The confusion arising between the broad and narrow uses of the word "license" has occasioned some anomalous decisions; and in many States, indeed, it may be doubted whether any distinction remains between an incorporeal hereditament and a license to mine. There is, however, the distinction in principle, which must be insisted on if we are to preserve clearness in the treatment of the cases.

A license, however, may also be created *by an instrument in writing* whose terms show an intention simply to confer a personal privilege to take minerals as land.

In Missouri, indeed, it is held that a license to mine being something more than a mere personal privilege to do an act upon land, passes an interest in lands within the Statute of Frauds. It follows that such an interest can only be created or conveyed by a written instrument, and an attempt to do so by parol amounts only to an estate at will. Practically this latter does not at all differ from a true license.¹

A license to take minerals has all the properties of any other

¹ The subject now is regulated in Missouri by statute. Gen. Stats. 1889, secs. 7034-7.

license to do a particular act or series of acts on land of the licensor. It is a personal privilege which is unassignable, is terminated by the death of the licensee, or by the conveyance (unless colorable), descent, or devise of the title of the licensor. It is revocable until some act is done or some expenditures made thereunder. In some States it is even then revocable.¹

In Iowa, where the licensee has made any expenditure under the license, the revocation of such a license cannot be made at any time absolutely, but must be preceded by six months' notice to the licensee, that being the notice to quit, to which a tenant at will is entitled at common law. As an alternative of this notice, however, the licensor may refund to the licensee such expenditure as he had made upon the land. This analogy of licenses to estates at will has also been drawn in Missouri, as was seen above.

In Iowa, moreover, the case of *Beatty v. Gregory* goes to the length of deciding a license to be a subsisting valid interest in real property for which ejectment will lie. This arose from a failure of the court to observe the distinction elsewhere recognized between a corporeal interest in the minerals in land and the grant of an incorporeal privilege to mine them.²

United States. *Williams v. Morrison*, 32 Fed. 177 (1887), C. C. E. D. Mo. An oral license or permission to take possession of a granite quarry, and work it for two years, paying therefor \$1.50 per thousand for all granite blocks taken out ready for shipment, is revocable at any time by licensor's giving licensees personal notice of its termination and notifying them to leave the premises. All stone taken out previous to such revocation is the property of licensees, but they are not entitled to any stone taken out subsequent thereto.

California. *Wheeler v. West*, 71, 126 (1886). A verbal agreement by which defendants were to enter and work a certain portion of plaintiff's mine if they saw fit, and to exercise their own discretion whether they worked it or not, paying the plaintiff one-fourth of the gross yield of gold, did not create the relation of landlord and tenant. "Their right under such a contract was not in and to the realty, but to the gold as personalty when it should be severed from the land. Had it been in writing it would have given to the defendant merely an incorporeal hereditament, but being verbal it operated as a license to them to dig and mine for gold within the specified limits,

¹ In Wisconsin it is provided by statute that a license to mine shall not be revocable after a valuable discovery or prospect has been struck by the licensee. Ann. Stats. 1889, sec. 1647, p. 987.

² In addition to cases here cited, see cases collected below under Div. V., B., this chapter.

which license protected them from a charge of trespass while in force, but was liable to revocation at the will of the licensors." "The licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, not as realty, but as personal property; and his possession, like that of an individual under a contract with the owner to cut timber or harvest a crop of potatoes thereon for a share of the proceeds, is the possession of the owner."

Omaha & Grant S. & R. Co. v. Tabor, 13, 41 (1889).

Colorado. A license to dig ore given by one tenant in common extends only to his interest in the mine. Evidence that a mine owner being informed that persons had entered on a mining claim conflicting with his, under order of court, and were taking his ore, consented that another person should join them, does not establish a license as to those already engaged in mining there.

Kamphouse v. Gaffner, 73, 453 (1874). A parol license

Illinois. is a protection against an action for trespass before its revocation. It is revocable at any time at the will of the licensor, and a subsequent conveyance or leasing by him works a revocation. Such a license is *only personal*, and lasts only so long as the land belongs to the grantor, or so long as he permits its exercise. It is irrevocable only when it is fully executed and not depending on continuous acts. An expenditure incurred or valuable consideration given will not avail to make it less revocable.

One who has a parol license to mine for lead on his licensor's land, and enters upon the land, discovers the crevice or range in which the lead is, opens it and runs a drift, expending a large amount of money, does not thereby acquire a right to continue to mine as against the owner or his lessee.

Munning v. Frazier, 96, 279 (1880). A license to mine, remove, and sell coal at a certain price per ton is not assignable.

Bush v. Sullivan, 3 Greene, 344 (1851). Under a parol license to work upon and prove mineral land for a share of the mineral raised, where the licensee has made an expenditure in sinking a shaft, mining drifts, etc., the license cannot be revoked without refunding the expenditure, or giving the licensee at least six months' notice, that being the notice to quit to which a tenant at will is by the common law entitled, and being given as an alternative to refunding expenditure, in order to give time to make the improvements available.

Although such parol license is within the Statute of Frauds, still, when connected with such improvements to prove the ground, it is voidable only upon such compensation or notice.

Beatty v. Gregory, 17, 109 (1864). A parol license to enter upon mineral lands and mine the same for a specified share of the mineral raised, for an indefinite term, under which the licensee has entered and expended labor and money in sinking shafts, running drifts, procuring machinery, and other preparations for mining, can be terminated by the licensor only by giving the licensee compensation for such expenditure, or the notice necessary to terminate a tenancy at will. The licensee has a "valid subsisting interest in real property and a right to the immediate recovery thereof," and under the statute the licensee may assert his right of possession against the licensor or his subsequent lessee with notice, by ejectment.

Upton v. Brazier, 17, 153 (1864). A parol license to mine upon a certain tract for a share of the minerals raised, will not, unless clearly expressed or necessarily implied, be held to be exclusive.

Such a license, unaccompanied by actual possession or the expenditure of money or labor thereunder, may be revoked or countermanded by the licensor. And this right of revocation may be exercised so far as it concerns a particular range or lode on the land concerning which the licensee has made no expenditure.

Anderson v. Simpson, 21, 399 (1866). A parol license to mine, under which licensee entered into possession, and which is also established by the evidence of the licensor, is exempted from the application of the Statute of Frauds. Such exemption is gained by a parol license to mine accompanied by possession, but the possession to be available must be ostensibly and actually taken under and by virtue of the license. It must have the actual or implied consent of the owner.

Harkness v. Burton, 39, 101 (1874). A parol license or lease of mining lands is valid, and can be terminated only by compensation to the licensee or the notice necessary to terminate a tenancy at will. Such license is good against a subsequent lessee or licensee with notice; such notice is to be inferred from the fact that the licensee conducted his mining operations within sight of the place where the subsequent lessee was at work.

A license to remove mineral from land occupied as a homestead, when its enjoyment for the uses of a homestead is not thereby impaired, may be given by the husband without the assent of the wife. If her consent were necessary to give validity to a parol license it would be presumed, if she had full knowledge of the work done or expenses incurred thereunder, and made no objection.

Barry v. Worcester, 143, 476 (1887). A license to enter upon land and take away gravel is revoked by an unqualified grant of the land. But where the conveyance is colorable, as a conveyance to a son or wife, and the possession and control remains in the licensor, and the licensee enters upon the land and continues to take the gravel unmolested, an action therefor may be maintained by licensor.

Missouri. *Desloge v. Pearce*, 38, 588 (1866). "A parol license or mere verbal privilege carries no interest in the land, and is a mere authority or privilege to do some particular acts upon the land of another. But a license to work mines is quite a different thing. It confers not only a right to enter and occupy, but to commit waste and carry away a part of the realty itself, and it is therefore an interest in lands, tenements, and hereditaments which is clearly within the Statute of Frauds, and must, in order to be effectual to give any permanent inheritable interest in itself, or any right to a continued and perpetual possession, be put in writing, and signed by the parties, or be given by deed; otherwise it can have no greater force or effect than to create an estate at will only, either at law or in equity."

"A parol license cannot be made the foundation of any right or interest in real estate, or to the future continuous possession thereof, nor to the continuation of the privilege beyond the will of the landowner. It is essentially countermandable or revocable at will."

Such a licensee is not a trespasser, and is protected from liability for what he does under the privilege, and for not replacing or restoring what has been changed under the privilege.

He may remove his fixtures and machinery when the license is terminated by notice.

That a licensee to mine had not worked the mine long enough to reward him for labor and expenditure will not prevent a revocation of the license.

Lunsford v. La Motte Lead Co., 54, 426 (1873). The proprietors of Mine La Motte, a large tract of mining land, promulgated rules and regulations by which those who desired to mine on the land, by signing the same acquired the right to do so under the provisions of the rules and regulations for the term of ten years from August, 1838. At the expiration of this term the agent of the proprietors made an agreement called "Register No. 3," by which miners might continue to mine upon subscribing this register or agreement upon the conditions therein stated. One of these conditions was that the agreement was to be subject to, and revocable by, the future actions of the proprietors.

Where the miner, after notice to cease mining and yield up possession of the land used and mined by him, resumed work and extracted mineral, without the consent of the proprietor, he was a wrongdoer, and acquired no title to the mineral raised.

Chynowitch v. Granby Mining & Smelting Co., 74, 173 (1881). Where an owner of mining lands complies with requirements of sec. 6441, Rev. Stat., and keeps posted in a conspicuous place, etc., a statement of the terms, conditions, and requirements upon which his land may be mined, among which were provisions that no right, title, or interest to the land or minerals should be acquired or owned by the persons mining, and that the lead delivered or money paid to the miners was not to be considered as the price of the ore, but compensation for labor and services, and, upon a violation thereof, or a failure to carry out such conditions, etc., the miner should forfeit all rights, and the owner might resume possession without notice to quit or action taken, the miner works under a license revocable on condition broken, and has no such interest in the land as will enable him to maintain an action for unlawful detainer and recovery of possession. The evidence showed that the miner had broken the condition and been ordered and then compelled to quit.

Nega v. Barber Asphalt Paving Co., 17 Ap. 294 (1885). An agreement between a land-owner and a paving company gave the latter the right to quarry and remove from the land such stones as might be used in paving certain named streets, the company agreeing to pay "\$100 per month, commencing July 16, while they are taking stone from this quarry."

The company paid two months' rent, but never quarried any stone. They were held not liable for any further sum.

This agreement was not a lease, but a mere license to get out certain minerals which did not displace the owner's general possession.

Garvey v. Gunther, 51 Ap. 545 (1892). Rules posted in accordance with Rev. Stat. 1889, sec. 7034, provided for forfeiture on failure

to work lots for six days. This was binding on lot holders, and such a failure was a bar to an action for unlawful detainer.

By the terms of the statute the plaintiffs must be considered to have accepted the conditions contained in the statement or rules.

Robinson v. Troup M. Co., 55 Ap. 662 (1893). When the landlord of mining lots fails to post the statement required by Rev. Stat. 1889, sec. 7034, the tenant's lease will under section 7035 expire at the close of three years, and a sub-tenant who during the three years bought the landlord's title takes at the expiration of that time, free from the claim of his immediate lessor.

Springfield Foundry & Mach. Co. v. Cole, 130, 1 (1895). Persons mining for zinc or lead ore on the land of another, subject to the printed statement of the terms, conditions, and requirements imposed by the owner, as provided for in Rev. Stat. 1889, sec. 7034, have no estate or interest in the land or in any of the ore until it is mined. They are licensees.

Cahoon v. Bayaud, 123, 298 (1890). By an agreement between plaintiff and defendant's grantor, it was provided that the former should "have the right to enter upon the premises . . . with men, teams, and tools for the purpose of prospecting and examining for mines and minerals, and to dig, carry away, and test such portions, etc., as he may think proper, . . . and if he, after making such examination and test, etc., shall be of opinion that they are worth working, he shall then have the right to go on and dig, carry away, and cause to be worked such of the substances there found." The expenses were to be borne by plaintiff, and the agreement was to "bind the heirs and assigns of the respective parties." This instrument conveyed no title to the land to the plaintiff. It gave him "a license or authority to enter upon the lands for the specific purpose of prospecting for minerals, and of extracting and testing the ores," and if he thought them worth working, he had an option which he could enforce; but in order to acquire an interest in the land it was necessary for him to declare his election to exercise his option, when he would be in a position to compel a conveyance. In the mean time he only had a license which was a personal privilege and not transmissible.

For twenty years plaintiff visited the land yearly, and did some prospecting, but nothing more. At the end of the ten years the land was sold to defendant. *Held*, that the licensee was bound to define his position towards the owner of the land as soon as it was fairly possible. "Fair dealing required of him to take the requisite steps, under his agreement, within a reasonable time. No time being specified in the instrument, the law affixed to it the obligation of proceeding within what would be deemed a reasonable time." The licensee having failed to do so, the land-owner had a right to revoke the license, and the conveyance of the land was such a revocation.

Huff v. McCauley, 53, 206 (1866). A verbal agreement, by which the owner of land, under which there was coal, allowed his neighbor to take coal out through his own land for his own use, if the former might use the latter's drift and scaffold to take out coal for himself, is either a license, an easement, an inter-

est in the land, or an incorporeal right arising out of it. If it was any of the last three, it was within the Statute of Frauds, and consequently a parol agreement would not be effective in transferring them. If it was a license, then it was revocable unless the licensee had expended money under it, in which case he must be put *in statu quo* upon revocation.

Neumoyer v. Andreas, 57, 446 (1868). A. leased a tract of land to N. for ten years for the purpose of mining, etc. Afterwards, during the lease, A. and N. entered into a contract by which it was agreed that if N. would sink a well, plank it, and put in a pump and engine, he should be entitled to dig all the ore on A.'s land, paying twenty-five cents a ton therefor.

N.'s right, under this contract, was a license carrying with it only the right to the qualified possession, such as would enable him to dig and take away the ore. It was no defence to proceedings by A. to regain possession at the termination of the lease.

"It falls not within the principle of *Caldwell v. Fulton*, 7 Casey, 475, but rather within the decision *The Johnstown Iron Co. v. Cambria Iron Co.*, 8 Casey, 241, and *Clement & Masser v. Youngman & Walter*, 4 Wright, 341. It resembles *Caldwell v. Fulton* in this, that the right to dig ore extends to all the ore upon the land, but it differs from it in the fact that no consideration passed to support a present conveyance of all the ore. That was a formal conveyance for a present consideration; this is a mere contract for the ore at twenty-five cents for each ton which might be dug. The well, pump, and engine were but the means to be used in reaching and lifting the ore. If the title to the ore itself passed, then the plaintiff must be deemed to have parted with it forever, without compensation, until it should suit the defendant to dig and pay for it. Having no express covenant compelling the defendant to dig a certain quantity or to mine it within a given time, the plaintiff has no adequate means of enforcing compensation, and no measure to fix its amount."

Youghiogheny R. Coal Co. v. Pierce, 153, 74 (1898): Testator by his will provided as follows: "To my second son, John, I give and bequeath the farm or plantation he now occupies, to be enjoyed by him, his heirs and assigns forever, with free privilege of taking what coal he wants for his own use or plantation off the home plantation." When the will was made, there was an open mine on the home plantation, but there was none on the farm occupied by John. *Held*, that the privilege of taking coal from the home plantation was personal to John, and did not pass to his successors in title to the land devised to him.

Virginia. Barksdale v. Hairston, 81, 764 (1886). A provision in an agreement that a partnership should have "the exclusive use and privilege of digging, hauling off, and working any ore now found, or which may hereafter be found, anywhere on said land," confers a mere license, and creates no estate or easement in the land. If no acts are done under this license, it is revocable, and a dissolution of the partnership works a revocation.

Hodgson v. Perkins, 84, 706 (1888). An agreement by which the owner of a farm bargained and sold the privilege of digging and working for gold thereon, for a share of the product, reserving the right to

cultivate and use the land, provided he did not molest or interfere with the lessees in searching or working for gold or other metals, the lessees to have and hold the land so long as they may deem it worthy of searching and working for gold or other metals, creates a personal privilege which is not assignable and is terminated by abandonment.

Tipping v. Robbins, 64, 546 (1885). Rev. Stats. of Wis., Wisconsin.

sec. 1647, provides that "no license or lease, verbal or written, made to a miner shall be revocable by the maker thereof after a valuable discovery or prospect has been struck, unless the miner shall forfeit his right by negligence such as establishes a forfeiture according to mining usages." Actual entry is not necessary in order to make a license irrevocable under this statute. If licensee working on an adjoining tract strikes a mineral-bearing crevice which is absolutely certain to run into the land which is the subject of the license, the license becomes thereby irrevocable, and the licensee may work the mineral.

A license by one tenant in common to prosecute mining on the land would not bind a dissenting tenant.

Tipping v. Robbins, 71, 507 (1888). The above-quoted statute has no application where the license has been given by one tenant in common without consent of his co-tenant. Licensee having mined without this consent is accountable to the co-tenants for the value of their share of the mineral taken out, less the expense of digging it out and removing it from the mine. No allowance was made, however, for mining the level into plaintiff's ground.

Blindert v. Kreiser, 81, 174 (1892). Rev. Stats., sec. 1647, provides that a parol license to mine on lands shall not be revocable "after a valuable discovery or prospect has been struck." Where, however, upon a joint discovery of ore by the owner of land, his son, and another, an oral arrangement is made, and upon prospecting thereunder ore is not found in paying quantities, the interest of the last is only a right to mine under a revocable license. He has no interest in real estate, and having sold out his interest to another who subsequently discovers ore in paying quantity, the interest of the latter is not subject to the lien of a judgment against the former.

V. OIL AND GAS LEASES.

Oil and gas, from their peculiar nature, which has been fully explained above (see p. 80), are incapable of being the subject of corporeal real interests. Oil and gas leases must, therefore, take upon themselves one of three forms:—

A. A lease of lands with the privilege of digging and boring for oil or gas. B. An incorporeal right to dig and bore, or a license to do so with an interest. C. A simple license or personal privilege to dig, bore, and appropriate the oil and gas.¹

¹ In New York the nature of property in oil under oil leases is governed by statute. Act May 10, 1883; Laws 1883, ch. 372, p. 1. See *Bank v. Dow*, 41 Hun, 13; *Broman v. Young*, 35 Hun, 173.

A. Lease of Lands with the Privilege of digging and boring for Oil or Gas.

A lease of lands with the privilege of taking oil and gas, or for the purpose of doing so, is, of course, a corporeal interest in the lands. It is like any other lease of lands, a tenancy for years, the mining privilege being exercised under express powers and covenants conferring them.

The tenancy is subject to the ordinary law of landlord and tenant; the mining privileges are governed by the law of contracts, and the rules applicable to mining rights generally.

Such a lease gives to the lessee the exclusive possession of the land itself, and an exclusive right to take the oil or gas. It results from this, as will be seen, that a lease of lands for the purpose of boring for oil or gas, which contains a provision restricting the possession of the land, is only a grant of a right to take oil, and belongs to the class of leases discussed in the next section.

The taking of minerals is a lawful act, and is not, as in the case of an ordinary lease of the land, waste. The lessee has the same right to these minerals as the lessee of land for the purpose of cultivation has to the crops produced from the land.

As was said in *Wettengel v. Gormley*, 160 Pa. 559, such a lease partakes of the character of a lease for general tillage rather than that of a lease for mining or quarrying the solid minerals, and a division of the land subject to such a lease does not vest the right to the rental or royalty in the owner of the part upon which the well is sunk, but that right is joint in the owners of all the parts, the oil being the produce of all, though taken out through one only.

Where such a lease is made of land which is not known to contain oil or gas, it may be merely a lease for the purpose of prospecting, or in some cases merely an option, and may be terminated by abandonment.

Pennsylvania. *Chicago & Allegheny Oil & Mining Co. v. U. S. Petroleum Co.*, 57, 83 (1868). An agreement to lease land for a term of years with the exclusive right to bore for and collect oil, giving one-fourth to the lessor, passes a corporeal interest. It is a lease of the corporeal tenement, with the added exclusive rights, etc. The taking by the lessee of his share of the oil is not waste, but a lawful act, unless the lease be forfeited by its own terms.

Stoughton's Ap., 88, 198 (1878). See p. 32.

Bronson v. Lane, 91, 153 (1879). By four separate deeds B. granted and sold to C., D., E., and F. fractional parts "of the oil and mineral right, saving and excepting lead ore, of, in, and to" certain described tracts of land, "together with the right to enter upon said premises, to dig or bore for oil or other minerals, saving and excepting lead ore; free right of ingress and egress; the right to erect such and so many derricks, engine-houses, and other structures as may be needful in the legitimate business of prospecting for, producing, and transporting oil or other minerals; the right to use so much of the timber growing on the said land as may be needful for fuel in operating the same, and such timber as may be required for the erection of derricks and engine-houses on the same. The right hereby conveyed, and the privileges therein annexed, to continue for a term of ninety-nine years from the date hereof, and then to revert to the grantor herein, his heirs or assigns." Rights of entry for purposes of tillage and of removing the timber are also reserved. "Under these deeds the grantees were tenants in common. They were not mere grants of an incorporeal right to dig and take in common with the grantor to which the principle of Lord Mountjoy's case applies. . . . Very plainly there is an express grant of exclusive occupation of so much of the land as was necessary for the enjoyment of the thing granted.

"It has been objected that upon so broad a construction the grantees might sink a well on every acre of the land, and thus effectually deprive the grantor of the entire surface. This might be so, but practically it was in the highest degree improbable. The grantor evidently had no such fear, and if he had, should have provided against it by limiting the number of wells or the surface space to be appropriated." The grantees had the right to divide the land into small tracts, leasing the same, with privilege to the lessees to enter for the purpose of taking oil.

Kitchen v. Smith, 101, 452 (1882). A lessee, under an oil lease, whereby he has exclusive possession of the land for the purpose of searching for, producing, storing, and transporting oil, is not a mere licensee; he is a tenant within the act of April 3, 1804, sec. 6, which provides for the recovery from a landlord by a tenant for taxes paid by the latter under compulsion.

Duke v. Hague, 107, 57 (1884). A lease of described lots of land and "of the exclusive right for the sole and only purpose of mining and excavating for petroleum, rock, or carbon oil," "to hold the said premises exclusively for the said purpose only," for twenty years, the lessors reserving for tillage and lumbering purposes the improved land and the use of all other land not necessary for producing oil, and further reserving certain royalties, vests in the lessee an estate for years, and not a mere license on the land demised; and such lessee is entitled to a notice of partition by the owners of the fee, and the lessee will not be bound by such partition if it divides the land to his injury, unless he has had notice thereof or been made a party thereto. "Notwithstanding these stipulations the lessee is vested with an interest in the land. *Chicago & Allegheny Oil and Mining Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83. His interest is that of a tenant for

years for the purpose of mining; he has an absolute right of possession of all the surface necessary, and no one else can rightfully take out oil during the term, save under him. The whole of the oil, or only a part, may be taken under the lease, but whatever shall be taken is of the substance of the realty. He is not an absolute owner of the whole of the oil, as he would be were all the oil in place conveyed to him in fee."

Chamberlain v. Dow, 16 W. N. C. 532 (1884). A lease for the sole and only purpose of mining and excavating for petroleum and carbon oil, minerals and gas, to continue so long as oil shall be found in paying quantities, not exceeding a term of ninety-nine years, is a chattel real, and as such a partnership asset.

Brown v. Beecher, 120, 590 (1888). Lease of land for fifteen years, with the sole and exclusive right and privilege during said period of digging and boring for oil and other mineral, and gathering and collecting the same from the land.

"The contract of February 3, 1882, between Cornen and Marsh is not a mere license, as in *Funk v. Haldeman*, 53 Pa. 229, for in that case the words of the grant amounted to neither a lease nor a sale of the land, nor of any of the minerals in the land. Funk's right was, therefore, declared to be a license to work the land for minerals, a license coupled with an interest which the licensor could not revoke. Nor does the contract of February 3, 1882, import a sale of all the oil, gas, and other minerals in the land absolutely; the cases of *Caldwell v. Fulton*, 31 Pa. 476; *Sanderson v. City of Scranton*, 105 Pa. 469, and others involving the same principle, do not, therefore, have any application.

"The contract referred to was a lease of the lands for a specified term, and for a particular purpose, at a fixed rent or royalty reserved out of the production. As to the legal force and effect of this writing there can, we think, be no doubt: it conveyed an interest in the land; in this respect it is distinguished from a license."

"But although the writing of February 3, 1882, is a lease, it conveyed to Marsh an interest in the land, — a chattel interest, however; the lease was a chattel real, but none the less a chattel."

Barnhart v. Lockwood, 152, 82 (1892). A lease by which the first party grants, bargains, demises, leases, and lets to the second party for eighteen years, described land, and gives and grants "the full, free, and exclusive possession of said piece of land during the term aforesaid, to bore, explore, and dig for oil," etc., in consideration of which the second party agrees to operate for oil and pay one-eighth of the oil obtained, is not a grant of property in the oil, but merely a grant of possession for the purpose of searching for and procuring oil.¹

Wettengel v. Gormley, 160, 559 (1894). G., who owned three contiguous farms, demised the entire tract to T. for fifteen years, "for the purpose and with the exclusive right of drilling and operating for petroleum, oil, or gas," for which T. was to pay a royalty of one-eighth of the product. G. then died, by his will devising one of the farms to each of his three children. T. had drilled all of his wells on one

¹ See also *Venture Oil Co. v. Fretts*, 152 Pa. 451; *Plummer v. Hillside C. & I. Co.*, 160 Pa. 483, pp. 173, 174, below.

farm, and all of the oil produced was taken from these wells. It was held that each of the three children was entitled to such part of the royalties as the proportion which the acreage of his farm bore to the entire tract.

For the reason that an oil well may drain oil from other land than that into which it is sunk, "an oil lease partakes of the character of a lease for general tillage, rather than that of a lease for mining or quarrying the solid minerals. In the case of a coal lease, for example, the exact location, with reference to lines on the surface, of every pound of coal taken may be easily determined. The stratum of coal is as fixed and permanent in its character as are the strata of superincumbent rocks and earth. Its ownership as between several devisees, or heirs at law after partition made, is as easily determined as that of the surface. The removal of the coal from one purpart does not diminish or disturb that which underlies another. The lines that divide the surface divide, with absolute fairness to all concerned, the sub-surface, and secure to the several owners, with certainty, the mineral that belongs to each. The rules applicable to coal leases, or leases of land containing any other solid mineral, are, therefore, not always capable of application to leases for the production of oil or gas, because of the difference between the solid and the fluid minerals, and because of the different conditions under which they are found and brought to the surface.

"There is in this State no precedent that we are constrained to follow, and we cannot find that the question has been decided in any other of the oil-producing States."

West Virginia. *Gale v. Petroleum Co.*, 6, 200 (1873). This was a lease of the land for one-fourth of the oil produced. The ordinary law of landlord and tenant was applied.

B. and C. *Incorporeal Rights and Licenses relating to the Extraction of Oil and Gas.*

Grants and leases of privileges and rights to bore for oil, and take the same from lands, like similar grants of mining privileges, confer incorporeal hereditaments or licenses, as the case may be.

So also a grant or reservation of oil or gas in certain land, passes an incorporeal right only. This arises, as has been above explained, from the nature of oil and gas, which is such that a corporeal interest in them in place cannot be created.

The distinctions between incorporeal hereditaments and licenses are the same here as explained under those titles in Divisions III. and IV. of this chapter. But there is perhaps one important element wherein an incorporeal right to take oil or gas differs from an incorporeal right to take an ordinary solid mineral. The test of the latter is, that it is not exclusive of the right of the grantor. Incorporeal rights to the fugitive minerals, on the contrary, are, from the nature of these minerals, necessarily so.

But while the right to take the minerals is exclusive, the right to possess the land is not so, and this is the ground of distinction from that class of cases collected in the preceding section. A lease, therefore, of described land, with the right of boring for oil or gas, if it restrict the lessee's possession to these purposes, creates an incorporeal right, and does not pass a corporeal interest in the land.

The exclusion of others from boring for oil or gas may be extended by the terms of the lease to other land than that upon which the right to bore is given.¹

United States. *Brown v. Spilman*, 155, 665 (1895). T. leased to B. "for the sole and only purpose of boring, mining, and excavating for petroleum or carbon oil and gas, and piping of oil and gas, over" a tract of forty acres, "excepting reserved therefrom ten acres," for two years, or as long as oil or gas shall be found in paying quantities. The consideration was one-eighth of the oil produced, and two hundred dollars a year for each gas well. It was further provided that the lessor might "fully use and enjoy the said premises for the purpose of tillage, except such parts as may be necessary for said mining purposes, and a right of way to and from the place or places of said mining or excavating."

Shiras, J.: "The subject of the grant was not the land, certainly not the surface. All of that, except the portions actually necessary for operating purposes and the easement of ingress and egress, was expressly reserved to Taylor. The real subject of the grant was the gas and oil contained in or obtainable through the land, or rather the right to take possession of the gas and oil by mining and boring for the same." The lease gave all the oil and gas under the entire forty acres.

The effect of the so-called exception was to forbid the drilling of wells upon the ten acres. The lease covered the entire tract for gas and oil purposes, but restricted the operations to thirty acres. *Westmoreland Co. v. De Witt*, 130 Pa. 235, followed.

New York. *Shepherd v. McCalmont Oil Co.*, 38 Hun, 37 (1885).

N., the owner of land, entered into an agreement with W., by which he conveyed to him, his heirs, executors, administrators, and assigns, the exclusive right of entering upon any part of the said land, of erecting buildings, engines, fixtures thereon; the right of way to and from the same, for the purpose of searching for minerals; and to mine, bore, or excavate for oil, or any other valuable volatile or mineral substance; and to carry on such mining, etc., to any extent he might deem advisable, but not to hold possession of any part of the land for any other purpose. The consideration was one-tenth the product, and W. covenanted to commence boring or excavating, etc., within one year, or as early as practicable thereafter, as he might deem expedient, or forfeit all right under and by virtue of the agreement. N. reserved the right to till the land.

¹ See below, p. 122, "Premises."

This was a license to W. and his assigns. It did not convey to him a corporeal hereditament. "We do not understand that there can be any property in rock or mineral oil, or that title thereto can be divested or acquired until it has been taken from the earth."

Pennsylvania. *Funk v. Haldeman*, 53, 229 (1866). A conveyance of "the free and uninterrupted use, privilege, and liberty to go on to any part" of certain land, "for the purpose of prospecting, digging, excavating, and boring and erecting machinery" "necessary for prospecting, experimenting, or searching to find oil," etc., with the exclusive use of one acre about each well, and rights of way for "himself, hands, and teams, tenants and undertenants, occupiers or possessors of said springs, mines, ores, or coal beds, in common with" the grantor, for which the consideration was \$200, and in case of success, one-third of the product; in case of failure, the premises to revert to the grantor, — passes not the minerals, etc., not an estate therein or in the land, but an incorporeal hereditament, a *profit à prendre*, a license coupled with an interest to work the land for minerals.

"But though we hold the papers in this instance to constitute a license and not a lease, it is a license coupled with an interest; not a mere permission conferred, revocable at the pleasure of the licensor, but a grant of an incorporeal hereditament, which is an estate in the grantee, and may be assigned to a third party. Even a parol license, without consideration, on the faith of which the grantee expends money, cannot be revoked at the pleasure of the grantor, but will be enforced in equity. *LeFevre v. LeFevre*, 4 S. & R. 241; *Rerick v. Kern*, 14 id. 271; and see *Wood v. Leadbitter*, 13 M. & W. 840, and cases in note.

"Though this proposition is doubted, perhaps denied, in some of the States around us, it is not to be doubted that where large expenditures have been made under a written license, rights are acquired which will be upheld both at law and in equity."

This incorporeal interest, while entire and indivisible at law, may be made divisible by the terms of the grant.

By the terms of the original grant the grantee's interest was to be enjoyed in common with the grantor, but when the latter, by a subsequent deed confirming the grantee's interest, arranges with him for a full development of the oil in the land, reserves to himself parts of the land in which to mine for oil in his own way, licenses the grantee to enter upon the unreserved parts to experiment for oil, to subdivide the premises into suitable lots for this purpose, and to assign and transfer them in whole or in severalty according to his pleasure, and obliges him to erect machinery and to diligently and energetically use all reasonable means to obtain oil, and on the faith of an exclusive interest, which the conduct of the grantors justify his holding, the grantee makes large expenditures, his interest within the unreserved portion of the land is exclusive, and the grantors can exercise no mining rights within those portions.

Dark v. Johnston, 55, 164 (1867). The owner of a farm and an island granted to another the right to search for oil on the island, and agreed, in case he was successful, to sell him the island for a certain amount. He further granted him the exclusive right to sink wells

on the farm, at a certain rent for each well, with a provision for the removal of machinery in case of failure.

This was a license personal in the licensee, which could not be revoked after the expenditure of money by him, but which he could not assign.

Oil, like water, is not the subject of property, except in actual occupancy, and a grant of it passes nothing for which ejectment will lie.

Rynd v. Rynd Farm Oil Co., 63, 397 (1869). R. granted to W. the exclusive right to bore for oil on his farm, R. to have one-fourth of the product, and in case, after reasonable experiment, W. should be satisfied that oil could not be found in profitable quantities, the lease to determine and possession to revert to R.; should oil be found in profitable quantities, the lease to be perpetual; W. not to interfere with R.'s farming.

On part of the land boring had been profitable; on the rest, operations had been abandoned. R., alleging that they had not been successful, brought ejectment for that part.

Held, ejectment would not lie to test R.'s right to bore for oil; but it would if W. had occupied the land for other purposes or to a greater extent than allowed by the contract, the license having been acted upon as irrevocable.

Union Petroleum Co. v. Eliven Petroleum Co., 72, 173 (1872). A lease of "the exclusive right and privilege of boring for oil, etc., upon the farm upon which the first party now resides," with rights of access and building; said boring to be done so as to do the least possible injury to the farm, lessee to pay \$150 and one-third the product; holes to be such as to satisfy the parties, and lease to continue until annulled by mutual agreement. This was an incorporeal hereditament. The remedy for disturbance of the right was case. Ejectment would not lie.

In an action for damages for disturbance of the right, defendants put in evidence a verdict and judgment in ejectment for the land. *Held*, not conclusive, and as it was not for the same subject-matter, irrelevant, unless the incorporeal right was derived from the party against whom the recovery was had.

Thompson's Ap., 101, 225 (1882). A. conveyed a tract of land to B., C., D., E., and F., for the purpose of boring for oil, etc., reserving to himself one-fourth of the oil produced. The grantees were to hold in undivided one-eighth parts, B., C., and D. having each two-eighths, E. and F. each one-eighth. B., C., and D. conveyed each one-half of his interest to G. and ten others, with a provision that they should be subject as to time, place, and manner of operation to the management and control of the majority in interest of the owners of the tract. G. afterwards conveyed to H. A majority in interest leased the tract to B. and C., their heirs and assigns forever, for the purpose of boring for oil, the grantees to retain one-half of the product. H. did not assign or assent to this lease. *Held*, H. held subject to the above provisions in the deed to G. and others, and was bound by the lease to B. and C., and consequently not entitled to a full share of three-fourths of the oil produced.

The interest conveyed by A. was not an estate in the land or minerals. It was an incorporeal right, a license. The grantees were engaged

in a business venture, and whether as partners or tenants in common makes no difference.

Westmoreland N. G. Co. v. De Witt, 130, 235 (1889). "From the nature of gas and gas operations, already discussed (see p. 32), the grant of well rights is necessarily exclusive. It was so held even as to oil wells, in *Funk v. Haldeman*, 53 Pa. 229, 247, 248, although in that case the plaintiff had a mere license to enter, etc., and not, as complainants here, a lease of the land; and it is exclusive in the present case over the whole tract."

A tract of land was leased for the sole and only purpose of drilling and operating gas wells, with a provision that no wells should be drilled within three hundred yards of a certain building, and a reservation of the surface for tillage. It was decided that the land within three hundred yards of the house was a part of the leased premises, and that the lessor might not grant to another the right to sink a well thereon.

Duffield v. Hue, 129, 94 (1889). Brown leased to Pratt all that certain lot or piece of ground situate, etc., according to a division of said tract into numbered sites, each site situated on lot numbered respectively on a map; and also sites for three wells south of a certain railroad to be designated and mutually agreed upon by the parties, for the term of fifteen years, "with the sole and exclusive right and privilege during said period of digging and boring for oil and other minerals on said lot." The rights of the lessee for oil-mining purposes were restricted to the specified sites. He had no right of possession for any purpose at any other place within the bounds of the territory described. He could not maintain ejectment for any of the land outside of the designated sites. If the lessors, or others acting for them, by boring other wells lessened his production or otherwise disturbed or interfered with his rights, he may have had his remedy, but not in this form. The lease was "a lease for production of oil, not a sale of the oil or of the land."

Duffield v. Hue, 136, 602 (1890). The lessee in the above lease, however, has the protection of the entire premises, and equity has jurisdiction to restrain the lessor or others acting under him from drilling wells thereon outside of the designated site, and thereby lessening the production of wells drilled by the lessee, such injury being destructive of his rights and incapable of adequate remedy at law.

Duffield v. Rosenzweig, 144, 520 (1891); s. c. 150, 543 (1892). The lease in this case is described as "a lease of the exclusive right and privilege of digging and boring," etc., is said to be exactly like the lease of *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. 173, and an action for trespass (such as action under the act of May 25, 1887, being indistinguishable from an action on the case) was held to lie for damages against one boring for oil on the premises but outside of the designated sites. The lessee "was entitled to all the oil he could produce at those sites; and, although limited in his actual operations, he had the protection of the entire premises, and the privilege of drilling other wells on the same terms, if the lessors should determine to have other wells drilled. But except as stated he was not in the actual possession of the land, nor, perhaps, of the oil beyond his actual production."

Greensburg Fuel Co. v. Irwin Nat. Gas Co., 162, 78 (1894). "A right to take gas from the land or water from the spring of another for private use or consumption, is ~~not~~ land held in fee, and the appliances and privileges necessary to the enjoyment of the right are not."

VI. RESERVATIONS AND EXCEPTIONS.

The rule is laid down broadly that a reservation of minerals or mining rights is to be construed as a grant, and this may be taken to apply equally to an exception. Where the interest retained by the grantor is an incorporeal right, it is a reservation, being something which before had no existence. But where a corporeal interest in the minerals is retained by the grantor, it is an exception thereof. This is the broad distinction, which, however, is often not regarded.

Massachusetts. *Farnum v. Platt*, 8 Pick. 339 (1829). This was an action of trespass *quare clausum fregit* for carrying away marble from a quarry. The owner of land having leased a marble quarry thereon for ten years, conveyed the land, "reserving the use of the quarry until the expiration of the lease." The lease was cancelled within ten years with the consent of the parties. *Held*, that the reservation was not thereby extinguished, but that it would continue in force till the end of the ten years.

Parker, C. J.: "The words 'until the expiration of the lease' mean, until it shall expire according to the terms of it, and not the termination of it by a new agreement between the parties to it. And the reservation enures to the use of the lessor as well as the lessee; for it saves the quarry from the operation of the deed, for the time, as much as it would if the reservation had been for the unexpired time, without any mention of the lease."

Munn v. Stone, 4 Cush. 146 (1849). This was an action of trespass for taking and carrying away a portion of a ledge of granite in land alleged to belong to the plaintiff. The plaintiff claimed title by a deed from Severance. Severance derived his title from Lyman. In the deed from Lyman to Severance was the following reservation: "Reserving to myself the privilege of entering said tract, and taking and carrying away stone from the northern part of said tract as far south from the northern end as the woods now stand in said tract." The subject of this reservation was the granite ledge in controversy. The defendants claimed by a deed from Lyman by which he conveyed all the rights to the stone in the granite ledge which he reserved to himself.

"We cannot distinguish between the reservation of a right or privilege of entering on a particular, designated part of a tract conveyed and carrying away stone, and a reservation of the use of a marble quarry, out of the land conveyed, for a limited time. Whether it is an exclusive use, or a use in common, may be a question; but it is the

same in both cases. We think, therefore, that this case is substantially governed by that of *Farnum v. Platt*, 8 Pick. 339. The only difference is, that in the case cited the use reserved was for a term of years; in this case it is a reservation to the grantor generally, which, being without words of limitation, is a right for his life. We are of opinion, therefore, that the reservation recited did not constitute a mere privilege to Lyman to take stone personally, but was a right and interest in the use of the ledge, which was assignable; and the defendants, having obtained a right of him, were not chargeable with the trespass complained of."

Stockbridge Iron Co. v. Hudson Iron Co., 107, 290 (1871). In a deed poll of land containing an ore bed, a clause "reserving to" the grantor "the right of mining on the granted premises" a certain quantity of ore annually, at a certain duty per ton, licenses him to enter and mine, but saves to him no title in the land, or in the ore before it is mined and separated from the land; does not restrict the grantees from mining at the same time, even to the exhaustion of the ore; and may be reformed in equity for variance through mutual mistake from the previous oral contract of the parties, as a reservation and not an exception from the grant, and therefore not within the Statute of Frauds.

Missouri. *Wardell v. Watson*, 93, 107 (1887). Minerals *in place* are land, and may be conveyed as such, and when conveyed they constitute an inheritance separate and distinct from the surface. A reservation of minerals and mining rights is construed as a grant. In either case the owner of the mineral estate has the right to dig and take the minerals. And for this purpose he has the right to enter and take possession even against the owner of the soil, and to hold such possession, and use the surface so far as may be necessary to carry on the mining, and this without express authority.

Snoddy v. Bolen, 122, 479 (1894). "An exception in a deed is always part of a thing in being and a part of the thing granted; while a reservation is of a thing not in being, and is newly created, as rents and the like. An exception withdraws from the operation of the conveyance some part of the thing granted, which but for the exception would have passed to the grantee under the general description; while the reservation is the creation, in behalf of the grantor, of some new right issuing out of the thing granted, — that is to say, something which did not exist as an independent right. . . . There can be no doubt that the qualifying words used in the deed from H. and T. to the county amount to an exception, the thing excepted from the grant being the 'valuable minerals' in the streets and alleys. The minerals thus excepted remained in the grantor in the same right as before the grant. . . . Coal, mineral, and stone under the surface of the earth are subjects of grant and exception; and when excepted in a deed become a separate and distinct inheritance."

New York. *Norton v. Snyder*, 2 Hun, 82 (1874). S., who owned certain land, leased to T. for the term of twenty-five years the exclusive right and privilege in all the cement stone on it, with power to quarry and remove the same, and with a covenant on

the part of S. to renew the lease for twelve years from its expiration. T. assigned to the N. C. Co. Subsequently, and before the twenty-five years expired, S. sold to A. part of the land, "excepting and reserving for the N. C. Co. the privilege of quarrying and conveying off the cement stone which they hold by virtue of a certain lease for the same." At the expiration of the lease S. renewed it. *Held*, that he had no right to do so in so far as it related to the stone upon the land conveyed to A. And the latter was entitled to an injunction restraining the lessees from mining on his land.

Marvin v. Brewster Iron Mining Co., 55, 538 (1874). A conveyance of land "reserving always all mineral ores thereon now known, or that may hereafter be known, with the privilege of going to and from all beds of ore that may be hereafter worked on the most convenient route to and from," passes the surface land in its condition at the time the grant was made, or in the state, for the purpose of putting it into which the grant was made.

"A reservation of minerals and mining rights is construed as is an actual grant thereof." "A reservation of minerals and mining rights from a grant of the estate, followed by a grant to another of all that which was first reserved, vests in the second grantee an estate as broad as if the entire estate had first been granted to him with a reservation of the surface."

Sloan v. Furnace Co., 29, 568 (1876). The words "reserving all the minerals underlying the soil," in the granting clause of a deed for conveyance of land, constitute an exception of the minerals from the operation of the grant; the fee thereto remains in the grantor.

Baker v. McDowell, 3 W. & S. 358 (1842). B. seised in fee of a tract of land, subject to an outstanding title to one half of all iron ore found in the premises, conveyed the same to H. in fee, "excepting and reserving to the said B., his heirs and assigns, the one half of all iron ore found on the land." *Held*, to be a reservation to the grantor himself of that half of the ore which was vested in him, and not a mere notice or reservation of the other half which was outstanding.

Shoenberger v. Lyon, 7 W. & S. 184 (1844). A reservation in a deed of conveyance which is as large as the grant itself is void, and the grant is valid.

S. and L., being tenants in common of H. Furnace and the lands appurtenant thereto, and at the same time owners of a right to dig, take, and carry away ore to be used at H. Furnace from a tract of land which belonged to a third person, L. conveyed to S. his right, title, and interest in the furnace lands and ore bank, reserving the full undivided one-half part of all the iron ore in any of the land now belonging to the H. Furnace, within not less than two miles of H. Furnace. *Held*, not a reservation of right to take ore on land which belonged to the third person, though not within two miles of said furnace.

Whitaker v. Brown, 46, 197 (1863). A provision in a deed in fee of land, "saving and reserving, nevertheless, for his (the grantor's) own use the coal contained in the said piece or parcel of land, together with

free ingress and egress by wagon road to haul the coal therefrom as wanted," is not a reservation but an exception. The property in the coal remains in the grantor, and descends to his heirs.

Alden's Ap., 93, 182 (1880). On May 9, 1786, Peter Grubb conveyed to Robert Coleman premises which he had derived from his father, Curtis Grubb, "saving and excepting unto the said Peter Grubb, his heirs and assigns forever, the right, liberty, and privilege at all times hereafter of entering upon the premises, etc., and of digging, raising, and hauling away a sufficient quantity of iron for the supply of any one furnace at the election of the said Peter Grubb, his heirs or assigns, at all times hereafter." Peter Grubb exercised those rights by supplying the Berkshire Furnace.

On May 7, 1788, he conveyed to George Ege, his heirs and assigns, "all the right, liberty, and privilege of him, the said Peter Grubb, etc., of entering at all times hereafter upon the premises aforesaid, etc., and of digging, raising, and hauling away a sufficient quantity of iron ore for the supply of any one furnace at the election of the said George Ege, his heirs or assigns, at all times hereafter. Ege supplied the Berkshire Furnace until 1793, from which time he supplied the Reading Furnace until 1858. Improvements in the manufacture of iron, especially the use of steam instead of water power, the introduction of anthracite coal as a fuel, and the hot blast, very greatly increased the capacity of this furnace. *Held*: 1. The owners of the reserved right were not restricted to the quantity of ore used by each at the time he elected the Reading Furnace, but to a sufficient quantity to supply any one furnace from time to time selected by them, although of a larger capacity and using modern improvements in manufacture not known at the time of the election of the Reading Furnace.

2. The measure of the quantity of ore to which they were entitled was so much as a given furnace would use in the course of a year, taking into consideration wear and tear and the necessity of going out of blast for repairs at certain intervals.

3. The ore when taken from the mines was their absolute property, which they might use or sell, provided the entire quantity taken out did not exceed the quantity measured by the capacity of one furnace.

4. If they omitted to take all the ore to which they were entitled in any one year, they could not take the quantity thus omitted in any succeeding year.

5. They were liable for ore taken or stolen in excess of that needed for one furnace, and were chargeable with interest thereon.

Foster v. Runk, 109, 291 (1885). A. conveyed a farm to B. by a deed containing the following reservation: "Excepting and reserving thereout unto A. all and all manner of metals and minerals, substances, coals, ores, fossils, and also all manner of compositions, combinations, and compounds of any or all the foregoing substances, and also all valuable earths, clays, stones, paints and substances for the manufacture of paints upon or under the said tract of land." B. then leased the farm to C. for the manufacture of bricks, with the right to use the clay thereon for that purpose, reserving a certain royalty on bricks made and sold. The next day A. also made a lease to C. for ten years

from June, 1866, with the privilege of renewal, granting the same privilege and under like provisions. Both leases were assigned to D., who took possession and manufactured bricks thereunder. D. renewed the lease with B., but not the one with A., and continued his possession and business after the expiration of the latter lease. D. refused to pay royalties to A. after 1873, claiming that A. had no title to the brick clay after his deed to B., and that his lease was therefore void. In a suit by A. against D. for royalties, —*Held*: 1. That the reservation in A.'s deed to B. included the clay suitable for making bricks, and was not restricted to the kind of clay from which paint could be manufactured.

2. That said reservation was not void, as being as broad as the grant, but the latter passed the ordinary glebe timber and waters. While the reservation, technically construed, might perhaps include everything which was the subject of the grant; yet the contracts of ordinary people are not to be so construed, but must be interpreted so as to carry out the manifest intention of the parties as determined by viewing the subject-matter thereof, as the mass of mankind would view it.

3. That by virtue of D.'s holding over after the expiration of A.'s lease, the same continued in force against him.

Lillibridge v. Lackawanna Coal Co., 143, 293 (1891). "There is no substantial difference between a title by exception out of a grant, and a title by direct grant of the same subject. In a case of an exception, the grantor retains the whole title which he already holds; and in the case of a direct grant, the grantee holds the whole title granted, and the ownership is as absolute in the one case as in the other. We have held that a grant of all the coal underneath the tract of land is an absolute conveyance in fee simple of all the coal, and no greater title than that could be acquired by an exception to the same effect in a grant of the surface. The books make no distinction."

CHAPTER III.

MINING LEASES: RIGHTS AND DUTIES ARISING THEREUNDER.

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| <p>I. Effect upon the Lease of the Non-existence, Exhaustion, or the Unmerchantability of Minerals.</p> <p>II. Duties and Obligations of the Lessee.</p> <p style="padding-left: 20px;">A. Lessee's Duty to mine.</p> <p style="padding-left: 20px;">B. Covenants to work Mines.</p> <p style="padding-left: 40px;">(a.) Covenants simply to mine.</p> <p style="padding-left: 40px;">(b.) Covenants to mine a Certain Amount.</p> <p style="padding-left: 40px;">(c.) Covenants to sink Wells and conduct Oil Operations.</p> | <p style="padding-left: 20px;">(d.) Covenants as to Manner of working the Mine and as to the Condition of the Mine.</p> <p style="padding-left: 20px;">C. Duty and Covenants to pay Taxes.</p> <p style="padding-left: 20px;">D. Rent and Royalty.</p> <p>III. The Premises.</p> <p style="padding-left: 20px;">A. Rights growing out of the Description or Nature of these or incident thereto.</p> <p style="padding-left: 20px;">B. Fixtures and Appurtenances.</p> <p>IV. The Subject of the Lease and the Right of the Lessee to Minerals not enumerated in his Lease.</p> |
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I. EFFECT UPON THE LEASE OF THE NON-EXISTENCE, EXHAUSTION, OR THE UNMERCHANTABILITY OF MINERALS.

THERE is no implied contract in a lease of land that it is fit for the purpose for which it is let, neither is there any implied warranty in a lease of a mine that it contains the mineral which is supposed to be in it, either as to amount or as to quality. The non-existence or exhaustion of mineral, therefore, is, as a rule, no defence to an action for the rent, since the lessor is not to be considered as having guaranteed its existence, and the lessee gets all that he has contracted for. Likewise, when the ore proves unmerchantable, this fact is not material in an action for the rent, and will not be considered as a defence to the same, unless the lessor expressly guarantees that the mineral does exist or that it will be merchantable; these are risks which are, and should be, properly speaking, assumed by the lessee. This rule, of course, has its application only in the absence of special contracts to the contrary, of mistake, fraud, or misrepresentation. Where there is a stipulation that the mineral shall be merchantable, the burden of showing its quality is on the lessee.

There is, however, an exception to the general rule, a class of cases in which the non-existence or exhaustion of mineral is a defence to an action for rent.

Circuit Judge Dallas in a recent case (*Ridgely v. Conewago Iron Co.*, 53 Fed. Rep. 988) lays down the rule that where there is a covenant in a lease to pay rent irrespective of product, the lessee must pay though he gets no mineral; but if he covenants to take out a stipulated quantity of mineral, or upon failure to do so, to pay royalty upon such quantity, his obligation is to pay for that quantity whether mined or not, and not whether it exists or not, and he is not bound to make payment after the exhaustion of the mineral.

This statement, although it gains some support from *Boyer v. Fulmer*, is much broader than the Pennsylvania cases justify. In many cases where the lease contains a covenant to mine a certain quantity or pay royalty thereon, exhaustion has been held to be no defence to an action for rent. The test is to ascertain from the terms of the particular lease and the circumstances surrounding its execution whether the lessee took the risk of the exhaustion of the minerals. It is believed that no fixed rule of construction can be laid down for the determination of this question. In *Timlin v. Brown* the rule was laid down that when there is an absolute grant of all the minerals, and the existence of mineral is an ascertained fact, the lessee takes the risk of its quantity. Where the existence of mineral is left in doubt, the risk is not assumed by him. When, therefore, by the terms of the lease, or the circumstances, it is apparent that the existence of mineral is to be determined by the operations under the lease, then the non-existence or subsequent exhaustion of the mineral terminates the lessee's liability thereunder. On the other hand, if the existence of mineral in the land has already been determined, the lessee is bound to pay royalty in strict accordance with his contract, although the mineral be exhausted. The amount of mineral in a tract of land can be known to no one before it is mined, and it is the lessee's own folly if he does not by covenant protect himself from the result of possible exhaustion. Where, however, the existence of the mineral is not actually known, either the contract is made for the purpose of determining whether or not it does exist, or it is made upon the assumption that it does exist; and if it does not, there is a case of

mutual mistake, against which equity will relieve. The difficulty of applying such an artificial test as is laid down in *Timlin v. Brown* is apparent in *Boyer v. Fulmer*. In this case, the court, while in terms applying the rule in *Timlin v. Brown*, resorted to all the circumstances to ascertain the intention of the parties, with little regard for the narrow distinction contained in that rule.¹

But while non-existence or exhaustion may thus relieve a lessee from the covenants of his lease, unmerchantability or unprofitableness, it is submitted, in the absence of special contract, mistake, or fraud, never does.

Where a lease provides for a test or other means of determining the existence of mineral, that means must be pursued, otherwise the non-existence of mineral may not be set up. Oil leases generally contain a provision that a well shall be drilled within a certain time, and until this is done the lessee may not set up the unproductiveness of the land established in any other way, however perfect.

In Pennsylvania it is provided by statute (act 26 May, 1893, P. L. 144) that where iron mines have been exhausted, and persons having the right to mine have abandoned that right for twenty-one years, it may be extinguished by judicial decree. Aside from the statute, it would seem that where the absolute owner of minerals *in place* had mined them to exhaustion, his estate would be at an end, and the owner of the soil would assume entire ownership to the centre of the earth.²

United States. *Lehigh Z. & I. Co. v. Bamford*, 150, 665 (1893), affirming *Bamford v. Lehigh Z. & I. Co.*, 33 Fed. 677 (1887), C. C. S. D. N. Y. By the terms of a lease, the lessee acquired the exclusive right for ten years to mine all metals and minerals to be found on the premises at a certain royalty. It was provided that if the royalties in any year should fall below \$1,000, the lessee should pay an additional sum to make the royalty amount to \$1,000: "Provided always, that if sufficient ores cannot be found to yield said minimum payment, and said party of the second part shall in consequence thereof fail to pay said minimum sum of \$1,000 yearly, then said party of the second part shall, if required by said parties of the first part, relinquish this lease and the privileges hereby granted, and the same shall cease thereupon."

It was not a defence to an action for the minimum royalty that there

¹ See article by Lucius S. Landreth, Esq., in *Am. Law Reg. and Rev.* for Jan., 1897.

² As to whether, upon the exhaustion of minerals, the mineral estate is terminated, see Chap. IV., Div. II., B.

was not sufficient ore to produce that amount. The above proviso did not have the effect of terminating the lessee's liability.

It was said by the court below: "There is no implied contract in a lease of land that it is fit for the purposes for which it is let, neither is there any implied warranty in a lease of a mine that it contains the mineral which is supposed to be in it. In the absence of a special contract, or of misrepresentation or fraud, or of the injurious and wrongful acts or omissions of the landlord, a tenant of land or unfinished buildings cannot properly refuse to pay rent on the ground that the land or the buildings became untenable." Nor is the defence good if rested upon the theory of a failure, not of beneficial occupation of the premises, but of consideration. The consideration "was the use of a mining property and works of large cost and doubtful value, but which might become of profit," and the lessee received that which he had contracted for.

Ridgely v. Conevago Iron Co., 58 Fed. 988 (1898), C. C. E. D. Pa. A mining lease requiring the lessee to mine at least four thousand tons annually, and to pay therefor a fixed sum per ton, or failing to take out such quantity to pay therefor, imposes no obligation to pay for such quantity after the ore in the demised premises has become exhausted.

Dallas, C. J.: "Mining leases commonly include, in addition to the usual undertaking to pay for what may be actually mined, a covenant that some fixed or ascertainable sum, at least, shall be annually paid. These covenants are not all the same or to the same effect. They may be divided into two classes: first, those which require the payment of rent irrespective of product; second, those which require that upon failure to take out a stipulated quantity, royalty with respect thereto shall nevertheless be paid. When the covenant is of the first class the tenant is liable for the rent, even if nothing could be got by mining."

"Where the covenant is of the second class his obligation is to pay for the stipulated quantity whether mined or not, not whether it exists or not. He contracts for promptitude and thoroughness in mining, not for the productiveness of the mine."

Walker v. Tucker, 70, 527 (1873). Lessee of land for mining purposes contracted "to work said coal mine during the continuance of this lease and agreement in a good and workmanlike manner." In an action for breach of contract it was alleged that lessees had suspended their operations and abandoned the working of the mines. "The plea alleges that 'on the said 15th day of September, 1871, the mines became wholly exhausted and incapable of yielding, when worked in a good and workmanlike manner, and with reasonable skill, care, diligence, and energy, sufficient coal to pay for working said mines,' etc. If the plea had stopped short, after alleging that the mines became and were wholly exhausted, it would have been good, but the subsequent qualifications show that these words do not mean exhausted of coal, but only exhausted of such coal as was capable of yielding, 'when worked in a good and workmanlike manner, and with reasonable skill, care, diligence, and energy, sufficient coal to pay for working said mines.' This might be, and yet the most valuable portion of the mine remain untouched. It might be the result of the

peculiar state of the market, and in nowise attributable to the difficulties to be encountered in mining; but from whatsoever cause the result, it is a sufficient answer that the courts must enforce contracts as the parties make them. . . . There is nothing in this instrument which authorizes a suspension or abandonment of mining *because it had become unprofitable.*"

"Where from the nature of the covenant it is apparent the parties contracted on the basis of the continued existence of a given person or thing, a condition is implied that, if the performance became impossible from the perishing of the person or thing, that shall excuse such performance. If, therefore, the coal mine was exhausted, the appellants were excused from further working it. Whether a coal mine is exhausted or not is a question of fact to be determined by the jury, from the evidence; and in determining this question, since the parties are always supposed, in entering into a contract, to have reference to the known usage and custom which enters into and governs the business or subject to which it relates, it would be proper to hear evidence of any known usage or custom relating to this question and showing when a mine is deemed exhausted."

Sylvester v. Hall, 47 Ap. 304 (1893). In an action on contract, the second count of the declaration averred the leasing of certain lands for the purpose of mining coal thereunder, and that prior thereto the coal had been removed therefrom, whereby said land was a loss to the plaintiff for the purpose for which it was leased.

This did not aver any covenant that the coal had not been mined from said land, and hence stated no covenant the breach of which was alleged. A demurrer thereto was consequently sustained.

McDowell v. Hendrix, 67, 513 (1879). Where a lease of Indiana. land for the sole purpose of mining coal provides that lessee shall pay a certain sum for each ton mined, and that after the first year the amount of rent shall not be less than a specified sum, it is no defence to an action for the rent, so long as lessee continues in possession, that sufficient coal could not be mined to make the royalty amount to the minimum rent, although it might be ground for abandonment.

Carl v. Granger Coal Co., 69, 519 (1886). Defendant, as Iowa. lessee of coal land, agreed to commence work as soon as practicable, and to mine coal from plaintiff's land by June 1, 1885, provided there was found a workable vein of good merchantable coal, and in that case to pay an agreed royalty.

No coal was in fact found, defendant never making the effort to find any; and whether there was a workable vein of coal upon the land, though alleged in the petition, was, in the nature of the case, a matter of conjecture. *Held*, that there could be no recovery of royalty, as defendant had mined no coal; and for his failure to prospect for coal, the existence of which was not known, only nominal damages could be recovered.

Fritzer v. Robinson, 70, 500 (1886). Where a lease of supposed coal lands for mining purposes was executed, delivered, and received under the mutual belief that there was coal underlying the land, and that the same could be mined, and it is clear from the testimony in

an action to recover rent that there was no coal there, equity will grant relief because of the failure of consideration rising from the mutual mistake, and will defeat a recovery by the lessor.

Carr v. Whitebreast Fuel Co., 88, 136 (1893). P. leased to D., for coal mining purposes, a large tract of land in L. county, for a term, until the latter, with the diligence and in the manner required by the lease, "shall be able to mine and remove all the available and merchantable and salable coal to be found therein." D. was to pay P. a royalty on all coal taken out, and was given the right to take coal from adjoining lands, through the shafts sunk on the leased premises; but it was agreed that D. should conduct the principal business of its mining in L. county, on and from said premises, and that it would mine therefrom a majority in bushels and weight of all the coal that it should mine in said county from year to year. Both parties believed, when the lease was made, that the land abounded in coal, but they were both mistaken as to its quantity. D. used due diligence in discovering and mining the available coal, and paid P. in full the royalty on the coal mined. The coal so mined was for several years a majority of all the coal mined by D. in L. county; but in later years, on account of the failure of the available coal, D. could not make the coal mined from the land such a majority except by reducing the output of other lands. *Held*, he was not required to do so, on account of the mutual mistake of the parties as to the amount of available coal in the land. P. could not recover royalty on the difference between the amount mined and that taken from other lands in the county. D. was not obliged to surrender the lease in order to avoid liability for this difference, as he could not do this until the coal was exhausted.

Fort Scott Coal & Mining Co. v. Sweeney, 15, 244 (1875). **Kansas.** S. leased to the company for the term of two years "the sole and exclusive right and privilege of boring, digging, and otherwise prospecting for coal, petroleum, lead, or other valuable substances" on a certain piece of land, "and of taking out and working the same" for the consideration of one dollar and of one cent per bushel of all coal taken out, with certain exceptions. The company also agreed to pay S. "royalty to the amount of \$500, on or before the first day of May, 1873, said money to be considered as royalty in advance if said company have not at the time taken out fifty thousand bushels of coal." In an action for this \$500 it is not a good defence that the coal found on and taken from the land was not "good, marketable, and merchantable."

Clark v. Babcock, 23, 164 (1871). **Michigan.** Under a lease of a saw-mill and salt-works, the lessor is not bound to furnish a well capable of supplying sufficient water in quality and quantity for the probable use of the works. The lessee leases an existing property, and there is no foundation for a claim for losses from failure unless it was injured by the lessor.

Gribben v. Atkinson, 64, 651 (1887). The owner of land leased it for twenty years "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable shipping iron ore which is or which hereafter may be found on, in, or under said land," with a

provision that the lessee might terminate the lease by giving three months' notice. It was also provided that lessee should pay a royalty of fifty cents per ton on all ore removed, and that a certain minimum amount should be removed each year or royalty be paid thereon, and that lessee should by the first of each year pay all taxes levied on the land; and further that the right of possession of said lands not occupied by the lessee for mining purposes should remain in the lessor, who should have the same right to use and occupy them as if the lease had not been made. The lessee having made diligent search and exploration for nine months, and having found no iron, and it having been shown by experts that no iron existed in or under the land, the lessee was not liable for the royalty under the lease, but was liable for taxes levied while he was in possession.

Clark v. Midland Blast Furnace Co., 21 Ap. 58 (1886).
Missouri.

An agreement was entered into by which A. "leased, conveyed, and transferred" to B. for the term of five years a piece of land "upon which there is an iron bank," with the exclusive right to mine for and remove the iron ore. B. contracted to pay a royalty for each ton mined, and to mine a certain amount per annum or pay royalty on that amount as a minimum. It was also provided that if at any time B. "fails to find sufficient merchantable iron ore on said land to justify the working of the same, or if in his judgment the same land cannot be profitably mined for iron ore," he might terminate the lease by giving a specified notice, and paying sums due under the contract to that time.

B. is liable for the rent or royalty (it is immaterial by what name this is called) so long as he occupies the land under the agreement irrespective of the amount or character of the ore in the bank. The words "upon which there is an iron bank" are matter of description, and neither a warranty nor a representation that there was a bank of merchantable iron ore on the land.

President of defendant corporation testified "the ore mined contained only thirty-three and one-third per cent of metallic iron, and was not merchantable. Ore situated as was the ore on this land would have to contain fifty per cent of metallic ore before it would be merchantable." Commenting on this the court said: "We regard the two sentences taken together as a statement that there was no merchantable ore on the land, with the qualification giving the witness's understanding of the term 'merchantable ore,' which was merchantable at the place of production. But this, it seems to us, is very different from the statement that it was not merchantable at all." Merchantable means "salable at market."

Beatie v. Rocky Branch C. Co., 56 Ap. 221 (1894). Plaintiff leased to defendant for twenty years the coal mines and veins or strata of coal underlying a certain tract, with the exclusive right of mining and carrying away the coal. The consideration was a royalty, which was to amount to a stipulated minimum. It was, however, provided that payments should cease "after the stone coal underlying said lands shall be fully taken, and said mines entirely exhausted, according to the practical methods of mining," and the defendant agreed in mining to support the superincumbent bed of rock by sufficient props and

stays. In defence to an action for rent, it was set up that there was no superincumbent bed of rock forming a support for the coal, and consequently it could not be extracted or mined by any of the practised or practicable methods of coal mining. *Held*, that the covenant for surface support was not a representation or assurance that all the coal in the tract was covered by beds of rock. Nor was it a defence that the coal could not be mined by any practised or practicable method. There was no such modification in the contract.

Wharton v. Stoutenburgh, 46 Law, 151 (1884). Where New Jersey. a lease of land for purpose of mining for iron ore stipulated for raising annually a specified quantity of ore, or the paying for that amount, the non-existence of that quantity is no defence to an action for the rent.

Cook v. Andrews, 36, 174 (1880). By an agreement to sell Ohio. and lease all the coal under a tract, with exclusive right to test the land for the same, and to open, mine, and remove the same, in case coal was discovered in workable quantity and quality, lessee agreed to pay lessor a certain sum per ton quarterly. A test was to be made within a stated time; and upon failure to begin mining within a stipulated time, lessee was to pay a certain sum annually, which was to be treated as an advance on coal thereafter mined. *Held*, this latter sum could not be recovered if there did not exist minable coal on the land. As to whether it did exist or not, the burden of proof was on the lessee.

Tod v. Stambaugh, 87, 469 (1882). Sale of coal, grantee agreeing to remove the same with all reasonable despatch, to pay for coal mined a certain sum per ton, and if coal should be found in sufficient quantity to render it practicable, to mine thirteen thousand tons annually, or to pay for that quantity, in which event the surplus payments were to apply to any future year's mining in excess of said quantity. In an action for rent, it is no defence that there is not sufficient minable coal on the premises to equal the quantity for which surplus payments had already been made.

Harlan v. Lehigh Co., 35, 287 (1860). In a lease Pennsylvania. of the right to mine and take away coal from R. and S. veins, and any other veins intermediate between said veins and Q. vein on the land of the lessor, there is no implied warranty that the land contains coal in workable quantity. Lowrie, C. J.: "Undoubtedly the court will construct a warranty or other contract where none is in terms expressed by the parties, if our common sense of justice requires it, and it is essential to complete the definition of the relation plainly intended to be established between the parties, and if its terms can be clearly deduced from the instrument, and from the nature of the transaction. The cases cited for the plaintiffs abundantly illustrate this principle, and we may test this case by it.

"We do not discover that there is any unexpressed term for this contract, which common justice requires us to supply, or any that is necessary to complete the definition of the relation intended to be established. We have already sufficiently indicated our opinion (3 Casey, 439) that the expense of a fruitless search for these veins was not intended to be charged to the lessors; and, of course, we cannot

construct any such a warranty. It was undoubtedly coal veins that were intended to be leased, and if the parties were mistaken about the fact, the result would be a right to dissolve the contract, and not a right to have a different contract in its stead. It is quite apparent that the R. and S. veins were known subjects of contract, that they were supposed to exist in the lessor's land as they did elsewhere, and that the lease was intended as a grant of the right to find and work them. But we have nothing that entitles us to construct a warranty that the lessees should be able to find and work them."

Kemble Coal & Iron Co. v. Scott, 15 W. N. C. 220 (1884). Plaintiff granted to defendant the exclusive right to mine, dig, and take away iron ore from certain land supposed to contain iron ore, for eleven years, lessees to pay fifty cents for each ton mined, and for the first year to pay rent on as many tons as they may be able to mine, "but for any period of three years thereafter the rent in the aggregate is not to be less than \$10,000, whether ore to that extent is mined or not, unless the irregularities of the ore veins should, to the satisfaction of the said parties of the first part, prove so great as to prevent the said parties of the second part from taking out ore to that amount." In an action of covenant for rent, "the defendant offered to prove, *inter alia*, that the premises did not contain forty thousand tons of workable, merchantable ore, fit for use in a furnace. This part of the offer was refused by the court below. We think in this there was a mistake; for though the court might have refused to adopt the word 'merchantable,' as depending too much upon the present condition of the market, yet certainly the ore which the defendant was required to pay for should be *workable* and fit for use in a furnace.

"Whether it was such ore as, in view of the present condition of the iron market, could be worked profitably is not the question, for of this there is no guaranty in the lease; but when the parties were contracting for and about iron ore, they must be taken to have meant something that could be properly used in an iron furnace, and something that, in at least some possible condition of the iron market, would be worth working. The parties did not contract on the basis of chemical analysis or future possibilities, but upon the obvious facts of everyday life; hence the material question was, Could the ore found in the leased premises, under the present methods of making iron, be properly used for the purposes indicated? If it could be so used, and there was enough of it, the plaintiffs had a right to require a full performance of the contract; if, however, there proved to be a failure in either of these particulars, then was the defendant released from payment, either in whole or in part, as the case might happen."

Mullenberg v. Henning, 116, 138 (1887). In a five years' ore lease, the lessees covenanted to pay thirty-five cents for every ton of merchantable ore mined, and to mine at least fifteen hundred tons annually during the term, or, in default thereof, to pay a royalty of \$525 annually, and that the lease should be forfeited at the option of the lessors, if at the end of each year at least \$525 as rent or royalty had not been paid. In an action of covenant to recover unpaid royalties for two years under the default rate, an affidavit of defence was

filed averring that, though the defendant had operated the mines in a workmanlike and skilful manner for about nine months, yet on account of the non-existence of sufficient ore, and its inferior and unmerchantable quality, they were unable to continue. *Held*, that the affidavit exhibited a good defence to the action.

Clark, J.: "If, however, it was established by actual and exhaustive search that at the time of the contract there was in fact no ore in the land, or no ore of the kind contracted for, it cannot be pretended, upon any fair or unreasonable construction of the contract, that the lessees were nevertheless bound for the 'royalty' of \$525 annually; for the payment of the royalty was undoubtedly based upon the assumption of the parties that ore, ore of the quality specified, existed there. The subject of sale, it is true, is the exclusive right to mine the iron ore, but for that right the lessors were to be compensated according to the number of tons of 'clean and merchantable iron ore' mined; the lessees undertaking to mine fifteen hundred tons annually, 'or in default thereof' to pay \$525 royalty. And, how could the lessees be in default in mining fifteen hundred tons annually, if there was no ore to mine? We are not to construe the contract to require the lessees to perform an impossible thing. The \$525 is not a penalty, it is the price of the ore. The grant was of the ore in place, and if the subject matter of the contract fail, the price is not payable. If there was no ore to mine, there could be no royalty to pay.

"But the contract having been made upon the assumption of the parties that ore of the quality mentioned existed in the land, when it became manifest that the parties were mutually mistaken, the contract obligation ceases. It may turn out at the trial, of course, that the ore was in fact merchantable; but as the case is now presented, we must assume the facts to be as stated in the affidavit of defence."

McCahan v. Wharton, 121, 424 (1888). A provision in an ore lease that if the lessees did not quit possession and surrender the leasehold on or before July 1, 1884, "the very act of their refusing or neglecting to quit possession and surrender this lease is hereby agreed on their part that there is a sufficient quantity of ore on said property to pay the royalty of \$1,200 on Feb. 1, 1885," etc., is not to be held conclusive upon the lessees.

Such provision in the lease is to be construed as an admission which threw upon the lessees the burden of proving that there was not ore in paying quantities upon the leasehold, and if not there, the lessees were not liable for the stipulated minimum royalty. *Muhlenberg v. Henning* followed.

Garman v. Potts, 135, 506 (1890). Under a stipulation in a lease that "the parties of the second part agree to mine the iron ore at the rate of fifteen hundred tons per annum, on an average, provided the iron ore can be advantageously mined, and as much more as they see fit to mine," it is proper to construe the word "advantageously" to mean "beneficially, conveniently, profitably, and gainfully." The covenant should not be so restricted as to relieve the lessees only from hidden defects in the mine, such as a fault, or some physical difficulty in getting out the ore; it is intended for their benefit, and entitles them to cease work at any time when it is no longer advantageous

from a commercial point of view. They are not liable for any rent or royalty, unless the ore would have been worth as much when mined as it cost to mine it.

Paxson, C. J. : "The court below gave to the word 'advantageously' its common and popular meaning. It is not a technical word or term of art, and the parties must be presumed to have used it in its known sense. As before observed, it was for the relief of the lessees; hence if the mining was no longer advantageous to them, they had a right to cease their operations. After defining, as we think properly, the meaning of the word, the court submitted to the jury the question whether the defendant could further work the mine to advantage, and they found specially that he could not. This settles the question of fact adversely to the plaintiff. It is to be observed that the cost of getting the ore to the market was not allowed to enter into the case. It was only the cost of the ore at the mouth of the mine that went to the jury. Surely, if it was not worth as much there as it cost to mine it, the defendant could not mine it advantageously to himself, however beneficial it might be to the plaintiff."

Springer v. Citizens' N. G. Co., 145, 430 (1891). By a lease of land for the purpose of producing oil and gas, the lessee agreed to pay a certain sum upon the execution of the lease, a royalty on the oil produced, and if gas were produced in paying quantities a certain annual rental on each well. The lease also contained a covenant that the lessee should complete a well within six months, and in case of failure to do so, should pay a certain sum semi-annually until completion.

That the land was worthless for either oil or gas was not a good defence, for the lessor was entitled to have this fact made manifest in the manner agreed upon, or to demand the sum stipulated for delay.

Timlin v. Brown, 158, 606 (1893). T. leased to B. for ten years certain land for the purpose of mining, etc., the coal contained therein. B. agreed to pay a royalty for all coal taken, to take out at least ten thousand bushels each year, and as much more as he chose, and in case he failed to get out so much, to pay for ten thousand bushels. In assumpsit for the minimum royalty for the last three years of the term, the exhaustion of the coal is no defence. This case is distinguished from *Kemble Iron Co. v. Scott*, *McCahan v. Wharton*, and *Muhlenberg v. Henning*, on the ground that in each of those cases the covenant for a minimum annual payment was not unqualified, the existence of the subject of the contract was unknown or uncertain, or if it existed, the quality could only be determined by actual use. In this case the coal was known to exist, and the quantity was as well known as it could be before it was mined out. "The only element of uncertainty, the quantity, they took the risk of by an unqualified covenant to pay a fixed minimum sum."

Cochran v. Pew, 159, 184 (1893). Where lessee in an oil lease had covenanted to commence a well within a certain time, it is not a defence to an action for rent that it had been ascertained by methods practised and approved by men of skill in the business that neither carbon oil or gas existed in the land leased, the exploration having been made on neighboring land.

"The conclusive answer in the present case is that the parties have

clearly stipulated for the mode in which the trial shall be made, and it is to be by a well on this land. There is no room for science, any more than there is for a jury, to say that it will be of no use to do it, the parties have explicitly agreed on the exact thing to be done, and the exact amount to be paid for the failure to do it. . . . Under such circumstances it is never open to the covenantor to say that the thing would be of no value to the covenantee if it were done."

Wilson v. Beech Creek Coal Co., 161, 499 (1894). Plaintiff leased to defendant's assignor "all of the merchantable coal contained in that certain seam," etc., for a royalty, "for each and every ton of merchantable coal mined and sold out of said seam," to be paid quarterly. "It is further agreed that should said seam of coal prove faulty in the strata or unmerchantable in its quality, so rendering it impracticable to mine or dispose of the same in reasonable quantity, the said lessee shall have the right to abandon the same," etc.

In an action for royalty it was not incumbent on the plaintiff to prove that it was practicable to mine merchantable coal in reasonable quantity. The burden of proving the contrary was on defendant.

Boyer v. Fulmer, 176, 282 (1896). The plaintiff, being the lessee of certain timber land, for the purpose of and with the exclusive right of mining for iron ore for fifteen years, assigned her lease to the defendant, and entered into an agreement with him whereby he agreed to mine and pay for not less than one thousand tons of iron ore in each year, and to pay royalty on one thousand tons per annum whether he mined that amount or not. In an action to recover royalties it was set up as a defence that the defendant had mined out all of the ore and paid royalties thereon. This was held to be a good defence. This case is distinguished from *Timlin v. Brown* on two grounds: 1. The existence of the ore was not known. The land was timber land, and "was leased for the purpose of digging for and mining ore which was supposed to be there, but it had not been developed." 2. There was not an absolute agreement to pay royalty on one thousand tons per annum. The agreement was to mine that amount, and pay royalty thereon whether mined or not. "That is, if he fails to mine the quantity of ore he agreed to take out, he pays for it just as if he had mined it. But he would only pay for ore which he might have taken out if he would. If the ore is not there, he is under no duty to pay, because he never could get it. The foundation of his liability to pay is the fact that the ore is there. If the ore is not there, the fundamental condition of all liability is gone."

Lehigh & Wilkes-Barre Coal Co. v. Wright, 177, 387 (1896). D. leased to P. all the coal under and upon a certain tract "for and until such time as all the merchantable anthracite coal shall have been mined and removed." In consideration thereof the lessee covenanted to pay a rent or royalty of twenty-five cents for every ton mined, and it was also provided that the lessee should pay a minimum annual rental, but should have the right if it should fail to mine the minimum amount in any year to make up the deficiency subsequently. The lessee paid the minimum rental for nine years, but in no year mined an equivalent amount. It then refused to pay any further royalty, and sought to defeat a forfeiture on the ground that the contract was a sale of the

coal, the rental was the purchase-money, and the lessee had already paid for more coal than the land contained. This defence was held to be bad. The contract was a sale, but it was not a sale for a lump sum. By its terms the lessee was bound to pay the minimum rental as long as it retained possession, whether it mined, or could mine, an equivalent amount. The object of the provision was to promote the rapid mining of the tract, and to protect the lessor in case the lessee should choose to mine slowly.

Williams v. Guffy, 178, 342 (1896). By the terms of a lease for twenty years, for the purpose of operating for oil and gas, it was provided that if gas should be obtained in sufficient quantities and utilized the lessee should pay \$500 per year for each well, that he should complete one well within six months, and "if oil and gas, or neither, is found on this property within two years . . . then this lease to expire and be of no effect." The lessee completed a well within six months, found gas and utilized it, and subsequently the land became exhausted and no more gas was produced. This terminated lessee's liability for rent.

West Virginia. Clifton v. Montague, 40, 207 (1895). Where the premises in a lease are described as "the premises known as the Bedford Salt Furnace property, together with all the appurtenances thereto belonging, including six salt wells, tools and fixtures of the same," there is no implied covenant on the part of the lessor that there are on the premises six salt wells of any particular productive capacity, or suitable for the purposes for which they are leased.

II. DUTIES AND OBLIGATIONS OF THE LESSEE.

A. *Lessee's Duty to mine.*

When the rent in a mining lease is reserved in such a form that its amount depends upon the amount of mineral taken out of the ground, whether it be a fixed royalty or a proportion of the product, the lessee is bound to work the mine, and to work it with *reasonable diligence*. This obligation is an implied covenant of the lease, for a breach of which the lessor may recover in damages. But recovery of rent or royalty is a bar to an action for damages for the breach.

The lessee is bound also to work the mine with reasonable care; that is, not wilfully or negligently to prevent the expected accruing of the royalty. The payment of the minimum royalty named in the lease is not a defence, for that provision contemplates a larger return, if it can be earned by mining with reasonable diligence and care.

Even where the amount of the rental is independent of the amount of mineral mined, the language of the lease may also

show that the parties contemplated that the mine should be worked, in which case such an implied covenant would arise. And on the other hand the lessee may be relieved of the implied obligation to mine by an agreement to the contrary.

In the absence of an express covenant to mine, etc., there can be no duty to do so where the amount of the rental is not fixed by the amount of mineral taken out. If the consideration is secure at any rate, the lessor is benefited by the failure, or at least it can make no difference to him whether mineral is extracted or not.

Owing to the peculiar nature of gas, its profitable working depending not upon its existence or quantity, but upon the pressure, the general rule, as here laid down, may be subject to modification by the surrounding conditions, as was the case in *McKnight v. Manufacturers' N. G. Co.* (below, p. 103), where the subject is discussed at length.

In Wisconsin, neglect to work the mine, by the usage of miners recognized by statute, works a forfeiture.¹

Illinois. *King v. Edwards*, 32 Ap. 558 (1889). K. on Nov. 11, 1887, leased to E. the coal and minerals under certain land, the lessee covenanting to pay as rent five cents per ton for all coal, etc., sold from said premises, "said rent to be paid as follows, to wit: the first days of January and July of each year."

The dates for payment of rent simply fix the days for settlement, and the lease does not bind the lessee absolutely to mine coal before those days. If the lessee is proceeding with the work with reasonable diligence, no forfeiture will take place by reason of the failure to produce coal.²

New York. *Genet v. D. & H. Canal Co.*, 136, 598 (1893). The lessee by negligent mining and failure to leave proper supports caused the collapse of the mine, which rendered it impossible to work it. In an action by the lessor for breach of contract, it was held not to be a defence that the minimum royalty had been paid. There was an implied promise not wilfully or negligently to incapacitate itself from taking out more than the minimum quantity.

"The acceptance of a minimum royalty for the safety and benefit of the lessee equally with that of the lessor, when a larger one was contemplated on both sides, involves an obligation of the lessee not wilfully or negligently to prevent the expected accruing of the greater royalty." "The question here is not one of waste or of injury to real property, or even of a tort or wrong. It is whether, under this contract, fairly and justly construed between the parties, there was an understood consideration for it, beyond the minimum royalty secured,

¹ Ann. Stats. 1889, secs. 1647, 1649, pp. 987, 988.

² See this case on p. 149.

in the business option and choice of the lessee to mine a much larger amount, if under the existing circumstances it should think proper to do so." There was such a consideration, and a failure to comply with it was a breach of contract.

Conrad v. Morehead, 89, 31 (1883). A lease for North Carolina. ninety-nine years contained a covenant by the lessor that the lessee might enter upon the land and dig for gold, silver, and other metals and minerals, use timber and erect machinery, and at any time he thought proper surrender the lease; and the lessee covenanted to pay one-tenth of the metal obtained. *Held*, there was an implied covenant by lessee to work the mine with reasonable diligence, and a failure to do so worked a forfeiture.¹

Maxwell v. Todd, 112, 677 (1893). *Conrad v. Morehead* followed. *Watson v. O'Hern*, 6 Watts, 362 (1837). A lease to a Pennsylvania. stone-cutter of "the privilege of quarrying and hauling away all the stone that he may find use for," for a certain term, at a certain price per perch, gives the lessee an exclusive right; makes him owner during the term, and creates the relation of landlord and tenant. *Such a lease is a contract on the part of the lessee that he will work the quarry; his failure to do so is a breach for which the lessor may recover damages.*

Lyon v. Miller, 24, 392 (1855). In covenant on a lease, whereby the lessee was given the right to dig and mine coal south of a designated line, the lessee to pay a certain sum for every bushel he may mine or dig upon said land, the lessors could not recover for coal mined north of a designated line, and that they were owners of that land was immaterial. For that they have their remedy by trespass.

The lessors, however, could recover not only for coal mined on the described premises, but for coal which the lessee "reasonably would and should have mined" thereon. The measure of damage, therefore, was not the amount per bushel stipulated in the lease, but that amount less the value of the coal in the mine.

Chalfant v. Williams, 35, 212 (1860). A coal lease and fixtures were sold for \$4,000, to be paid — \$600 down, \$216.62 at thirty days, fifty cents for each ton mined until \$815 was paid, and then twenty-five cents for each ton mined until the whole consideration was paid.

The fair interpretation of this is that the purchasers were to take out enough coal to pay at these rates the entire consideration. But parol evidence is admissible to show that at the time of the sale the seller said he would take the risk of the purchasers doing so, such testimony not being contradictory of anything expressed in the deed.

Koch's Ap., 93, 434 (1880). Where a right to mine ore or other mineral is granted, in consideration of the reservation of a certain portion of the product to the grantor, the law implies a covenant on the part of the grantee to work the mine in a proper manner, and with proper diligence, so that the grantor may receive the compensation or income which both parties must have had in contemplation when the agreement was entered into. For the breach of this covenant there is an adequate remedy at law, and a court of equity will not entertain a bill to compel the grantee to perform his contract.

¹ See this case on p. 152.

Smith v. Munhall, 139, 253 (1890). A lessee of certain tracts for the purpose of operating thereon for oil and gas, assigned them, in consideration whereof the assignee agreed that if he or his assigns operated the leaseholds and found oil in paying quantities, he or they would pay \$100 for the lease, upon which a paying well was found. The assignee surrendered these leases and took new ones from the land-owner which he assigned to innocent parties, whereupon the original lessee sued for breach of contract. *Held*, that there was no cause for action.

"There is no promise or agreement on the part of Munhall or his assigns to operate for oil. Under the agreement he may or may not bore on all or none of the leaseholds. It is not alleged that M. or any other person has obtained oil in any quantity on any one of the leaseholds."

"The surrender of the leases, and the taking of new leases in his own name, did not affect the legal rights of the plaintiff; possibly it may be of advantage to him. We can see no reason to doubt that if at any time during the period for which the leases run any person find oil in paying quantities on the land, the plaintiff can recover the stipulated conditional payment from Munhall."

McKnight v. Manufacturers' N. G. Co., 146, 185 (1892). "A lease of a mine or a quarry, at a rental to be fixed by reference to the quantity of material removed therefrom, implies an agreement on the part of the lessee to work the mine or quarry. The reason is that, while the lessor does not lose his material out of the mine or quarry, he loses his income therefrom. *Watson v. O'Hern*, 6 W. 362; *Koch's Ap.*, 93 Pa. 434. A lease of land for oil purposes imposes a somewhat different obligation upon the lessee. The oil is of such a nature that, if not removed through wells upon the surface of the leasehold, it may be wholly lost to the owner of the land by reason of operations on lands adjoining. The duty to develop the land, that is, to test thoroughly the existence of oil in the rocks that should bear it, and if oil be found, to sink so many wells as may be reasonably necessary in view of surrounding operations to secure so much of the oil underlying the land as may be obtained with profit, grows out of the nature of oil, and the methods by which the oil is reached and brought to the surface. An oil lease must be construed, therefore, with a due regard to the known characteristics of the business. *Brown v. Vandergrift*, 80 Pa. 142.

"Oil and gas leases are ordinarily combined in the same instrument, and are classed together. For many purposes such classification is natural and appropriate; but this case brings us to consider an important difference between oil and gas, which makes it necessary to distinguish for some purposes between an oil and a gas lease.

"Oil, when brought to the surface, is gathered into a receiving tank or tanks at or near the well. When necessary or desirable, it is removed by gravity or by pumping into the pipe lines that serve the district in which the well is located, and conveyed to storage tanks, where it remains until delivered to a purchaser. It is a matter of no consequence what the pressure may be at the well, for there can be none in the tanks except that of gravity. The well that throws off violently its five thousand barrels per day and that which reluctantly gives up four or five barrels under the persuasive power of the pump

will have their product gathered into the same lines of transportation, or resting in the same storage tanks. Gas cannot be gathered, stored, or transported in this manner. If found in sufficient quantity, it is turned from the well into the line, and the pressure at the mouth of the well is the motive power by which it is driven through the line to the consumer miles away. If the pressure at a given well is much below that in the line with which it is connected, the gas from that well cannot enter the line, but will be driven back by the superior force it encounters at the point of connection. For this reason, a well producing gas in sufficient quantity to be profitably utilized if there was a market for it near at hand, may be entirely valueless if its product must find a market at a distance too great to justify its transportation by a line of its own. In an oil district, each well, no matter how large or how small its product may be, is separately operated, and a well may be profitably operated so long as its yield pays more than the cost of producing the oil. In a gas district this is impracticable. The product of many wells is gathered into one line so long as the pressure is sufficient. When the pressure in any one falls below the standard necessary for purposes of transportation, that well must be turned off. Its product cannot be transported separately, and, unless it can be used near by, it is valueless. These well-known facts peculiar to the production of gas must be taken into account in the construction of leases for gas purposes."

The lease provided that lessor should receive one-eighth of the oil produced; that lessee should commence operations within eighteen months, and, if he failed to get oil in paying quantities, but a sufficient quantity of gas to justify him in utilizing it at some point not on the premises, he should pay lessor a certain royalty so long as the well was so utilized. A gas-producing well was completed, and, after being operated for two years, was destroyed by an accident, and no further operations were conducted by the lessee. In an action for not putting down other wells to protect the territory against the effect of operations on adjoining lands, it was error to charge that a failure to drill such wells was a breach of an implied covenant, imposing a liability in damages, in the absence of a reasonable excuse therefor.

"As we have already seen, every barrel of oil brought to the surface may be utilized in the same way. Whether the well that produces it is a strong one, yielding many barrels per day, or a weak one, yielding but few, is a matter that in no way affects the ability of the producer to market his oil, or the prices to be obtained for it. In gas territory, the lessee may sink many wells and find gas in them all, but he can utilize only such of them as have a volume and pressure sufficient to enable him to transport the gas through his line and deliver it to the purchaser. If no one of them has the requisite pressure, then no one of them can be utilized; the gas must be wasted, the cost of the wells will be lost, and the lessor entitled to no royalty. What is the proper way to develop and operate a gas lease is, therefore, a question beset with some difficulty. Its settlement requires some general knowledge of the business, and some knowledge of the local field. The lessee may have a good well, from which he can utilize the gas with profit. He may put down another on the same farm, and

thereby so reduce the pressure in the first as wholly to destroy its value, without getting a sufficient pressure at the second to enable him to utilize that. The gas, if coming from one well, would be of great value. Divided in such manner that the volume and pressure at each is below the necessary standard, the whole is lost. Thus the application of the rule laid down by the court below, as the jury must have understood it, might result in this, that the effort of the lessee to discharge the implied obligation of his contract for the common benefit, should end in the total destruction of the leasehold, and a common misfortune. The mistake of the court below was in failing to take account of and to read into the contract between the parties, the peculiar nature and characteristics of the business of producing and transporting gas, which the parties themselves well understood, and which their contract shows were before their minds when it was entered into."

Moreover, when a lease provides that all wells shall be located by the lessor, he may not maintain an action against the lessee for not drilling additional wells, if he never fixed upon a location for any additional well, or called upon the lessee to locate one for him, the lessee having no right to drill except at points indicated by the lessor.¹

Hill v. Joy, 149, 243 (1892). Recovery on an oil lease of the royalties provided for therein is a bar to a subsequent suit for damages for breach, during the same period, of the implied covenant for proper and sufficient operation.

Jamestown & Franklin R. R. Co. v. Egbert, 152, 53 (1892). It was not a good defence to an action for rent that defendant had operated in all directions around the land, testing the general character of the land, and found that there was no oil or gas in the neighborhood.

"It does not follow that because there was no oil on adjoining property, oil might not have been found on this tract of one thousand acres."

Lehigh & Wilkes-Barre C. Co. v. Wright, 15 C. C. R. 438 (1894). "All contracts which require action do by implication of law mean that the thing to be done shall be accomplished within a reasonable time. It cannot be doubted that one purpose of the annual minimum payment of royalty provided for by our mining leases is to induce the lessee to mine and remove the coal with reasonable speed."

"In the case before us, under a mining lease dated Nov. 29, 1879, it appears that up to July 1, 1888, or for a period of nearly ten years, when the lessees decline to make further payments, the coal mined did not in any one year equal the minimum of \$4,000 specified in the lease. In view of the circumstances of the case, it would seem that the mining of the coal was not prosecuted with that diligence which is the implied obligation in every similar contract, and which the lessors had the right to look for in this one."²

B. Covenants to work Mines.

Most often the lease itself contains a covenant to mine, by the terms of which the lessee is in that case governed.

¹ See also *Kleppner v. Lemon*, 176 Pa. 502 (1896).

² Affirmed in 177 Pa. 387.

(a.) This may simply be a covenant to mine, or to mine in a certain manner.

(b.) When a royalty is reserved there is generally a covenant to mine a certain amount, with an additional covenant, in case of failure, to pay royalty upon that amount.

(c.) Oil and gas leases generally contain a covenant for the sinking of wells within specified times, or for their drilling to a certain depth, and often also for the prosecution of the business of exploring for and producing oil.

Cases which have arisen from actions for damages for breach of this covenant are collected below. The nature of these covenants will be discussed at length under the title of "Forfeiture,"¹ as the usual method of enforcing them is by forfeiture.

(a.) *Covenants simply to mine.*

Here the general rule is that the lessee is bound by the terms of his lease, and that the mine had become unprofitable is not a valid reason why operations should be suspended. If, however, it is shown that the mine has been wholly exhausted, and it appears from the nature of the covenant that the parties contracted on the basis of its continued existence, the condition is implied that, if the performance became impossible from the perishing of the person or thing that shall excuse the performance. Whether a mine is exhausted is a question of fact, and evidence of known custom and usage relating to the business of mining is admissible to show when a mine is deemed exhausted.

Generally it may be said that one who covenants to mine the premises which he has leased must do so with reasonable diligence. Each contract, however, must be interpreted in accordance with its terms.

Illinois. *Walker v. Tucker*, 70, 527 (1873). See this case on p. 91.

Iowa. *Peters v. Philipps*, 63, 550 (1884). Plaintiff leased to defendant certain lands for the purpose of mining coal, and defendant agreed to have the mine opened and in operation within nine months, and not to allow the mine to stand idle for more than sixty days at one time, and to pay plaintiff a royalty upon the coal taken out, that being the only consideration. *Held*, plaintiff had a right to demand that defendant prosecute the mining of coal on his land with reasonable diligence, and to an injunction restraining defendant from using the shaft sunk on his land for the purpose of

¹ Page 146.

mining coal on an adjoining tract which defendant had leased while the mining on the land in question was neglected.

Reed v. Beck, 66, 21 (1885). By a lease of land for mining purposes the lessee agreed to pay a royalty on coal mined and taken out by the lessee, and to mine to an extent necessary to make the rent \$500 a year. And in case the rent or royalty for coal mined during any period of six months should amount to less than \$250, the lessee also agreed to advance the difference, to apply, however, on future royalties, and also on the first day of each month — after the shaft is opened and mining commenced — to pay the lessor the amount due from the previous months. *Held*, that though an action might lie against the lessee for failure to open the mine, an action to recover rent would not lie until the shaft was opened and mining commenced.

Ray v. Hodge, 15, 20 (1887). H. bought of R. and D. an Oregon. interest in a lease of a mine for the consideration of “\$750 cash, and \$1,250 when 250 flasks of quicksilver were produced, to each of the parties of the first part.” This agreement was made subject to the condition that the management of all operations should remain in the hands of the owners of the other interest in the lease. The lease provided that the lessees should keep two men constantly employed. *Held*, that it was inferable that H. had undertaken to work the mine in connection with the co-lessees; that if he ceased to do so when the mine if worked in the ordinary manner would have justified its development, the deferred payment would become due. The contract did not compel the working of the mine after it appeared profitless to do so, and before a recovery could be had against him, it must be shown that he neglected to operate the mine when it could have been worked consistently with his interest.

Davis v. Moss, 38, 346 (1861). Where, by the terms Pennsylvania. of a lease, it was provided that if the lessee should cease mining operations for twelve consecutive months, it should become void, the entry of the lessees from time to time to clean and grease an engine which had been erected on the premises and used in mining, after the suspension of operations for twelve months, was not a continuance of mining operations within the terms of the lease, and would not prevent a forfeiture.

Miller v. Chester Slate Co., 129, 81 (1889). Under a stipulation in a lease of a slate quarry that it shall be forfeited if the lessee fails “to work the quarry” for three consecutive months, it is not absolutely necessary that the slate rock should be removed from the pit during the time mentioned. If the pit is obstructed by ice and snow, or filled with water, so that it is impossible to take out slate, the doing of anything necessary for the removal of these obstructions will be held to be within the expression “working the quarry.”

N. Y. & E. T. Iron Co. v. Stephens, 5 Lea, 468 (1880). Tennessee. A. granted to B. for thirty years the privilege of taking iron ore from a certain lot, “and in the event the ore in said lot became exhausted, then B. has the privilege of opening and working another lot adjacent.” *Held*, that exhaustion did not mean that every spadeful of ore should be mined, or that it should be taken out where the outlay would exceed its value, but that the mine should in good faith and by proper and approved methods be exhausted.

A. is entitled to recover the value of ore taken by B. from adjacent land before the exhaustion of lot originally leased.

Petroleum Co. v. Coal, Coke, & Mfg. Co., 89, 381 (1890). By a lease of "mineral and petroleum interests" for ninety-nine years, lessees bound themselves to pay "one-tenth part of the net profits of whatever may be discovered and worked in and upon said lands deemed advisable to be tested and worked by" the lessees, and they agreed "to commence testing said property within three years' time."

Under this the lessees were under no obligation to test or work unless they deemed it advisable; there was therefore no consideration, and the lease was void. It was a mere option based on no consideration.

If, however, the contract be construed as binding the lessees to test within three years, that provision is a condition, and failure to comply therewith works a forfeiture of the lease. No other compensation was contemplated than that which would result from the discovery and working of mines. The testing, therefore, was of the very essence of the contract, not only with respect to time, but as to the thoroughness and certainty with which the mineral value of the land should be ascertained. The test required was such as would discover not only the existence of minerals, but their commercial value, considering their abundance and accessibility. It should afford such information as a prudent investor would desire before expending money in development.

(b.) *Covenants to mine a Certain Amount.*

In this case much the same principles are applicable as stated in the preceding section, and if the lessee sees fit to covenant to mine a certain amount, he will, as a general thing, be held to strict performance. Or, in case the ore is not taken out, he will be held liable for the payment of rent or royalty the same as if it had been taken out,—this being regarded as equivalent to stipulated damages, which may not be reduced by evidence of the actual value of the mineral,—and this, whether or not there is an express covenant to pay royalty on a minimum amount.

To be excused the lessee must show that he has worked the mine to exhaustion, or has worked all the ore there is in it. The terms of the covenant in each case of course govern its construction.

Iowa. Flynn v. Coal Co., 72, 738 (1887). A lease of coal land provided that the lessee should pay a certain royalty on coal taken out, but it also provided and made it of the essence of the contract that a certain amount of coal should be taken out.

Held, that the lessee was bound to pay royalty on the amount agreed to be taken out, whether actually taken out or not, and that, too, although a portion of the term was necessarily occupied in making preparation to begin mining.

New York. *Gilmore v. Ontario Iron Co.*, 86, 455 (1881). Plaintiff and defendant entered into an agreement by which plaintiff leased to defendant certain land for such term as would enable the lessee to mine and remove the iron ore therein. Defendant agreed to mine all the ore where the vein was fifteen inches thick, and where it was of less thickness it was at lessee's option whether he would mine or not. He also agreed to pay twenty cents a ton for all ore mined, and to mine at least eight thousand tons annually. In an action to recover royalty: *Held*, the defendant was bound absolutely to take out all the ore where it lay in a vein fifteen inches or more thick, and also where it was thinner, unless it used the option given it not to do so.

If there was a vein of the specified thickness, the company was bound to work it to exhaustion; if there was not, it was bound to work what there was, to let plaintiff know that it exercised its option, or to surrender the lands; otherwise, the only answer to a demand for royalty was, that the land had been exhausted of ore. Until one of these occurred, the defendant was bound to pay at least \$1,600 a year.

McIntyre v. McIntyre Coal Co., 105, 264 (1887). Plaintiffs leased to L. certain coal lands for twenty years. The lessee covenanted to mine not less than seventy-five thousand tons a year for the first five years, and not less than one hundred thousand tons per annum thereafter, and to pay a rent or royalty of thirty cents per ton on all coal mined, payments to be made quarterly. In case the coal mined in any one year fell short of the quantity specified, the lessee covenanted to pay a sum equal to the amount he would have had to pay if he had mined the minimum. Then followed this provision: "Provided, that if in any year the party of the second part shall mine and carry away more than the proper minimum quantity for such year, such excess, or so much thereof as may be necessary, may be set off against the deficiency of any other year or years within the same division of the term hereby demised; so much of such excess as is applied to make up such deficiency having been paid for, shall not be paid for again." In an action to recover rent or royalty for a quarter during which no coal had been mined, it was shown that during the preceding years of that division of the term the defendant, assignee of the lessee, had mined and paid royalty on an excess over the minimum quantity specified.

Held, that the lessee was entitled to set off sufficient of the excess to make good the deficiency; that he was not required to mine continuously during each year of each division of the term the minimum quantity specified; nor was the application of an excess limited under the terms of the lease to a deficiency occurring in the preceding years, but that the lessee had the right to mine during the first year of each division and pay for the whole amount required for that period; and, having done so, unless he mined an additional quantity he would be discharged from further liability.

Kreutz v. McKnight, 53, 219 (1866). See p. 155.

Pennsylvania. *Powell v. Borroughs*, 54, 329 (1867). The lessee of a coal mine agreed to pay so much per ton for coal mined, and take out a certain number of tons annually, and if he should fail to do so, to pay the same amount of rent as if he had done so. *Held*, that

settlements for coal taken out were not, as matter of law, a discharge of liability for breach of covenant to mine a certain quantity. The covenant to pay rent for all the coal mined and taken away was distinct from the covenant to mine a certain number of tons.

The contiguous mines were leased by the same lessors to one lessee. It was stipulated in both leases that the lessee was not bound to mine more coal than could be taken away by cars furnished by a certain railroad; it was no excuse for not working one mine that the cars furnished were insufficient to take away coal mined in the other. He should have worked this mine so that it could have had its proportion of the cars furnished.

That the coal which the lessee failed to take out was of greater value at the end of the lease than if it had been taken out, is not a ground for reducing the recovery for the breach to nominal damages; the rent per ton agreed upon was stipulated damages to the extent of the non-performance.

(c.) *Covenants to sink Wells and conduct Oil Operations.*

Much the same rules prevail, as to these, as are given in the preceding sections, modified by the difference pointed out in *Westmoreland Nat. Gas Co. v. DeWitt*, 130 Pa. 235 (p. 32), between ordinary minerals which are stationary and these fugitive and volatile products. There is some difficulty in measuring the amount of damages in case of breach of covenant; but some such method as that indicated in *Bradford Oil Co. v. Blair* should be adopted as the best available.

New York. *Chamberlain v. Parker*, 45, 569 (1871). Plaintiff leased land to defendant with a provision that defendant should put down a well by a certain time to a certain depth, and pay three dollars a cord for the wood standing on the lot. No rent was reserved, and no term of demise was stated; but a right of entry for condition broken was reserved. Defendant failed to put down a well, and plaintiff brought suit for breach of contract. Court below held the measure of damages to be the cost of putting down the well. This was held to be error. The damages should have been nominal. The putting down of the well was of no benefit to plaintiff, as the oil would all belong to the defendant, unless after it was dug defendant's default in paying for timber would enable plaintiff to re-enter. There was consequently no loss to plaintiff.

Pennsylvania. *Bradford Oil Co. v. Blair*, 113, 83 (1886). A. leased his farm to B. to explore for and produce oil, at a royalty of one-eighth of the production. The lease contained the following covenant: "To continue, with due diligence and without delay, to prosecute the business to success or abandonment, and if successful, to prosecute the same without interruption for the common benefit of the parties." B. assigned an interest in said lease to C. and D., and

they with B. assigned to E. Two wells were bored on the farm, both of which were producing wells. E. refused to bore any other wells. In an action of covenant brought by A. against E. for breach of the covenant above quoted: *Held*, that the said covenant was not the personal covenant of B., but a *covenant that ran with the land*, and therefore bound E. Under this covenant the lessee's obligation was to prosecute the business to as great an extent as, taking the knowledge, skill, and appliances available at that time into consideration, could reasonably be done and leave the lessee a profit.

The measure of damages for breach of said covenant is as follows: Ascertain how much more oil the plaintiff ought to have received than he actually did receive, and the value of it during the times when it should have been delivered to him; from this deduct the cost of producing what ought to have been produced at the time under the circumstances and with the appliances then known, and add to this remainder the interest on it from the time when the oil ought to have been produced to the present time.

"We do not think damages for not securing flowing oil are to be ascertained exactly as if it were a stationary mineral.

"If oil be not utilized at a proper time, it may be lost forever by reason of others operating near by. Not so with stationary mineral. It remains for future development. While there is some difficulty in the way the damages were ascertained in this case, yet no better or more accurate manner is pointed out."

Galey v. Kellerman, 123, 491 (1889). Where a lease provides for drilling a well within a certain time, and in the event of failure to do so, the payment of a certain sum of money, and also provides that the lease shall be avoided by the failure to fulfil this covenant, the lessor may, in case of such failure, recover the price of delay; and the lessee cannot set up as a defence that the lease is avoided by his default.

Kleppner v. Lemon, 176, 502 (1896). It is an implied condition of every lease of land for the production of oil therefrom, that, when the existence of oil in paying quantities is made apparent, the lessee shall put down as many wells as may be reasonably necessary to secure the oil for the common advantage of both lessor and lessee. In determining when and where such wells shall be located, regard must be had to the operations on adjoining lands, and to the well-known fact that a well will drain a territory of much larger extent when the sand rock in which the oil or gas is found is of coarse and loose texture, than when it is of fine grain and compact character. Whatever ordinary knowledge and care would dictate as the proper thing to be done for the interests of both lessor and lessee under any given circumstances is that which the law requires to be done as an implied stipulation of the contract.

A lease conferred on the lessee "the exclusive right of drilling and operating for petroleum and gas on the plaintiff's land." If oil and gas were found certain royalties were to be paid. There was no distinct covenant for putting down wells on the land except that which related to the first or experimental well, which was to determine the value of the land for oil purposes. The right to divide the leasehold

and to sublet the parts into which it was divided for oil purposes was distinctly reserved by the lessee. The defendant had oil and gas leases on adjoining properties. He put down one well on plaintiff's land, and other wells on adjoining lands near to the boundaries of plaintiff's land, with the express purpose of securing the oil under plaintiff's land through these wells. *Held*: 1. That the lease contemplated the production of the oil underlying the plaintiff's lot by means of operations conducted on its surface; 2. That the number and location of the wells necessary to carry out the purposes of the contract was a subject belonging primarily to the lessee; 3. That in disposing of this question the lessee was bound to take into consideration the fact that his lessor was the owner of the oil, and to arrange and conduct his efforts to bring it to the surface in such manner as should best protect the interests of both parties to the contract; 4. That he was not bound to put down more wells than were reasonably necessary to obtain the oil of his lessor, nor to put down wells that would not be able to produce oil sufficient to justify the expenditure; 5. That the fact that the oil might be obtained in time through other wells, on the lands of other owners, was not enough to excuse the lessee from his implied undertaking to operate the land for the best interests of both owner and operator.

In such a case the court may decree, on bill in equity filed, that unless the defendant shall drill another well within a certain time specified his leasehold estate in said land shall be deemed to be abandoned, except as to the well actually drilled on plaintiff's land, and a certain specified space around it.

To the same effect are *Wills v. Manufacturers' N. G. Co.*, 180, 222 (1889); *Fennel v. Guffey*, 139, 341 (1890), which see on pp. 159, 163.

Fleming O. & G. Co. v. So. Penn. O. Co., 87, 645 West Virginia. (1893). On Feb. 22, 1889, J. leased to defendants' assignor a tract of land for oil purposes. By the lease the lessee covenanted "to commence operations for a test well within one year from the date thereof," "and to complete the same within eighteen months from said commencement;" "and in case said party of the second part fails to so commence and complete said test well, the lease shall be forfeited and void." The lessee made the preliminary surveys for the purpose of ascertaining the location of the oil belt in the autumn of 1889, and fixed upon the spot for the test well on Jan. 30, 1890. In the autumn of 1889 he also contracted with D. to drill the test well, work to begin on January 30. D. cut timber for his derrick on the tract between Feb. 1 and 6, 1890, and in January contracted with one B. to haul the machinery to be used in drilling the well, but this hauling was delayed by the impassable condition of the roads. The well was completed Aug. 21, 1890.

Held, the operations for the test well were commenced within the year; there was no forfeiture, and the plaintiff to whom J. leased on Feb. 28, 1890, had no title.

(d) *Covenants as to Manner of working the Mine and as to the Condition of the Mine.*

The lessee is held to the observance of such covenants when not entirely inconsistent with the skilful and proper working of the mine. Moreover, he will be required to exercise all reasonable diligence in carrying out the terms of his lease, and will be held liable for a disregard of the same unless prevented or interfered with by the lessor; such covenants, having been made with a view to the reversion of the property to the lessor, will prevail against established custom. These covenants are not personal, but *run with the land*, and become binding upon the assignee of the lease.

Illino. *Coppinger v. Armstrong*, 5 Ap. 637 (1880). A covenant by lessee in a lease of land with the right to use rock and burn lime, that all rubbish and spalls should be removed at the expiration of the term, is binding on the assignee of the lease.

Coppinger v. Armstrong, 8 Ap. 210 (1881). But this covenant does not apply to rubbish and spalls on the premises at the execution of the lease, but only to such as result from the operations under the lease.

Cons. Coal Co. v. Schaefer, 135, 210 (1890), affirming s. c. 31 Ap. 364 (1889). S. demised the coal under certain land to N. & H. for twenty-five years, upon condition that they should begin to sink a shaft within three months, and continue the work. Lessees covenanted to "work the mine in a sound, safe, and workmanlike manner, so as not to ruin the works, and leave necessary pillars, and prop up works securely." The lease also provided for forfeiture for failure to comply with any of its covenants. The lessees sunk a shaft and did some work, but became insolvent, and stopped in March, 1886. The mine was finally abandoned in April, and it began to fill with water. It required three months to fill, and the mine was never worked afterwards. On June 22, 1886, the leasehold was sold at judicial sale to the coal company's grantor. In April, 1888, S. gave notice that he terminated the lease. *Held*, in action of forcible detainer, he could recover. "To permit the mine to keep on filling up with water, and to permit the mine to remain full of water for a long period of time, thereby causing detriment to the mine, and even danger to its continued existence, was surely a breach of the covenant to work the mine in a sound, safe, and workmanlike manner."

The word "ruin," as used in the contract, is not confined in its meaning to an utter destruction of the works, but must be presumed to have been intended to include a serious impairment of the works, and anything which would essentially promote their injury, decay, or destruction.

Iowa. *Randolph v. Halden*, 44, 327 (1876). The lease of a coal mine stipulating that the lessee was to leave the mine in good working condition at the expiration of the lease, he could not remove

the supports and pillars from the mine even after the supply of coal was exhausted. "The custom of miners to remove the pillars cannot be permitted to control the contract when the effect of allowing such custom to prevail would be to render nugatory express stipulations of the contract."

Michigan. *Clark v. Babcock*, 23, 164 (1871). Lease provided that lessor should put the salt-works in complete order by a fixed time, and in case he did not, that the lessee might do so, and deduct the expense from the rent. *Held*, if the lessor had failed to put the works in order, then if the well were capable of being put in order, it was lessee's privilege and duty to do so; but if lessor, by what he had done, had rendered it incapable of being put in order, then lessee was not bound to spend any money on it.

It being contended that the work of the lessor in attempting to put the works in order diminished the flow and injured the well, but the expert evidence, which was uncontradicted, tending to prove the contrary, the court will not take judicial notice of the means used in the construction of salt wells to make the tubing serve its proper purposes, and to shut out the detrimental matters which would otherwise injure the work.

New Jersey. *Keeler v. Green*, 21 Eq. 27 (1870). A stipulation in a lease of a quarry of a horseshoe shape, and having faces on the northwest, north, east, and southeast sides, that "said quarry shall be worked as the face is now open, following the good merchantable stone as deep as such stone shall run, and in good quarrying shape," is not violated by quarrying one of the faces to a greater extent than the other, provided the good merchantable stone was taken out to the depth indicated, and the face was left in good quarrying shape, that is, with a good, fair, even surface, and not with jagged recesses.

Pennsylvania. *Moyers v. Tiley*, 32, 267 (1858). See p. 155.

Trout v. McDonald, 83, 144 (1876). Lease of privilege "of going on the south end of his farm, near No. 14 school-house, and from there west to the old barn, and mining and taking out all the coal he can reach beneath the surface;" lessee to work the mine in such a manner as to do the least possible damage to the land; to fill up holes made, and level off all banks and ridges, so as to leave surface smooth and natural. *Held*, lessee not confined to one opening, but might make as many as are necessary to reach the coal.

Timlin v. Brown, 158, 606 (1893). Lessees covenanted to give up the mine at the end of the term "in a good, workmanlike condition." When they began work they put up a small derrick to raise coal from the bottom of a shaft. They subsequently abandoned this method, adopted a slope, and the shaft was of no further use except as an air-shaft. They removed the derrick. This was held in no way to affect the workmanlike condition of the mine, and was not a ground for damages.

South Carolina. *McBee v. Loftis*, 1 Strob. Eq. 90 (1845). Where by the terms of a grant of the right of mining the grantee is entitled to work, free of expense, etc., and is in no other respect restricted, he may conduct the work in any manner he thinks proper, either by himself, his servants, agents, or assigns.

C. Duty and Covenants to pay Taxes.

Taxes on coal, like other minerals, whether *in place* or mined, are of course, in the absence of covenant, payable by the owner thereof. If there is a severance of ownership of surface and mineral *in place*, the latter being land, the owner is liable to taxation thereon as land.¹ The obligation is not transferred to the owner of the surface by calling the instrument *creating* the mineral estate a "lease." If it *creates an ownership of the minerals*, the "lessee" (*vendee*) must pay the taxes thereon; if it creates but an estate for years, or a privilege or license to mine, the "lessor" must pay the taxes on the unmined coal.

This general rule may be changed by contract, and the obligation of paying taxes on unmined coal as between lessor and lessee may be put upon the "lessor" (*vendor*), though the lease amounts to a sale, and creates an absolute ownership in the "lessee" (*vendee*). In this event, if the *vendee* or "lessee," upon demand, pays the tax to the proper collector, he may recover the amount thereof from the lessor, or set it off in action for royalty or rent.

Pennsylvania. *Logan v. Washington County*, 29, 373 (1857). Where the owner of coal land has sold the right to *take all the coal that is in his land*, and retained the land itself, the owner of the land and the owner of the coal are each taxable according to their several interests. But this principle does not justify a higher valuation on the two interests taken separately, than there would have been if both had continued in the same person.

Chevington & Bunn Co. v. Lewis, 10 W. N. C. 196 (1881). The tax imposed upon the corporations by the seventh section of the act of April 24, 1874 (P. L. 68), of three cents upon each and every ton of coal mined by such corporations, or by their lessees, is a tax upon the corporate franchises, to be measured by the number of tons so mined, and not a tax upon the coal itself.

The lessees in a coal-mining lease covenanted to pay all taxes and imposts whatsoever assessed or charged during the continuance of the lease upon the demised premises, or any part thereof, or upon the coal produced therefrom. *Held*, that this clause of the lease does not include the tax on the corporation (the lessors) imposed by the seventh section of said act of April 24, 1874, which tax is payable by the corporation and not by the lessees.

Sanderson v. City of Scranton, 105, 469 (1884). Where the surface of land and the minerals *in place* thereunder have been severed by the agreement or conveyance of the owner, and the respective divisions have become vested in different owners, the municipal authorities are bound to levy their taxes according to the ownership and

¹ Illinois, Hurd's Rev. Stats. 1895, ch. 94, sec. 6, p. 1053.

value of these divisions. And each owner can be made responsible only for the tax on his own interest, whether underlying strata or surface.

The liability of the owner of coal or mineral *in place* for taxes levied thereon results from the nature of his estate or interest, and therefore he is not relieved from this responsibility, on the principle *inclusio unius est exclusio alterius*, by an express covenant in the instrument of severance that he shall pay all taxes levied upon the coal mined, without recourse to the lessor to refund the same.

D. L. & W. R. R. Co. v. Sanderson, 109, 583 (1885). Vendee in last case having paid taxes on the coal *in place*, under protest, brought this action to recover the amount thereof from the vendors. It was held that no recovery could be had, and the principle of *Sanderson v. Scranton* was approved.

City of Scranton v. Gilbert, 16 W. N. C. 28 (1885). When the title to the surface of land and to the coal thereunder is vested in one person, the whole must be assessed together for purposes of taxation as land. The surface and the coal cannot be separately valued and assessed, as in the case where the surface and substrata are vested in different owners. The fact that in such case the aggregate valuation on the surface and on the coal beneath is no greater than should be put on the land, does not authorize the separate valuation and assessment of the coal.

Hecksher v. Sheaffer, 17 W. N. C. 323 (1886). While, as a general rule for the purposes of taxation, all improvements upon land, such as houses, coal breakers, etc., constitute part of the land, yet persons owning different portions thereof may agree among themselves to such an apportionment of the taxes in respect of such improvements as they may see proper.

A lease of coal land contained a covenant on the part of lessees to pay all taxes upon improvements: *Held*, that the lessees were bound by said covenant to pay the increased amount of taxes assessed upon the land by reason of its increased value in consequence of the erection upon it of houses, coal breakers, etc., by such lessees.

Woodward v. D. L. & W. R. R. Co., 121, 344 (1888). There was a provision in the coal lease in this case that the lessees should pay all taxes which might be imposed upon the surface of that portion of the land occupied by them and upon the improvements by them made thereon, and upon the coal after it was mined, and that the lessors should pay all the taxes imposed upon the coal in the ground, and upon the surface not occupied by the lessees. The lessors were bound by this covenant, although the lease was such an instrument as under *Sanderson v. Scranton* conveyed a fee simple in the coal, and the lessees having paid taxes on the coal *in place* could recover the amount thereof from the lessor.

This liability of the lessors arises from the contract, and is not released by a subsequent conveyance to the lessees of a portion of the surface, with a provision that it should in no way affect their interest in and title to the coal under the lease, nor the rights of either party under its provisions, which were to remain as if the said conveyance had not been made.

Flory v. Heller, 1 Monaghan, 478 (1889). This was a lease of land with the privilege of quarrying for slate, with a provision that machinery and fixtures placed there by lessee should belong to him.

The landlord was assessed taxes on the land and paid the same, and the tenant was assessed taxes on the quarry and machinery which he had placed upon the land. *Held*, the tenant cannot deduct taxes paid by him from royalties due the landlord as rent.

Miles v. D. & H. Canal Co., 140, 623 (1891). In a lease of coal land which created a divided ownership of coal and surface there was a provision that the lessors should pay all taxes on the leased land; they were held liable for the taxes on both surface and coal *in place*. And the lessees having paid taxes demanded of them upon the coal *in place* had the right to retain the amount thereof out of royalties otherwise due the lessor.

Pettibone v. Smith, 150, 118 (1892). A covenant in a coal lease providing "that the said lessees shall pay all and every the United States, State, and local taxes, duties and imposts on the coal mined, the mining improvements of every kind, and the surface and coal land itself," does not include a municipal assessment to defray the cost of building a sewer, and to provide for the cost of grading a street.

D. Rent and Royalty.¹

"Mining rent" is a term which is used to mean the consideration money of a mining lease, whether that lease creates a tenancy, grants a license or an incorporeal right, or conveys a fee.

It may be (1) a fixed sum; (2) a certain annual sum; (3) a royalty on the amount of minerals extracted payable at fixed intervals or times; (4) such a royalty, but not less in the aggregate than a fixed amount each year; (5) such a royalty and a covenant to mine a certain minimum amount or pay royalty thereon.

As rent must be something issuing out of the thing granted, and not a part of the thing itself, when the consideration is a part of the minerals, it is not strictly a rent, but an exception.

According as the lease creates a fee, an incorporeal right, a tenancy or license, the rent may be either purchase-money or a true rent.

If the lease out of which it arises is a true lease of the soil or a grant of a right to take minerals, the money or thing which is paid therefor is rent and has all the qualities thereof.² It is a preferred debt. It is income, and such as has accrued goes to the personal representatives, and not to the heir of a decedent. It belongs to the life tenant as profits.³

¹ See also title "Forfeiture," p. 147.

² See pages 8-14, where the cases on

³ North Carolina Code, 1883, sec. 1763. this point are collected.

If on the other hand the rent arises from a conveyance which passes a freehold estate in the minerals, it is the purchase-money thereof, and has none of the qualities of rent. The fact that it is called rent, that it is paid in certain amounts at fixed intervals, does not establish its nature. If it is paid for the minerals in the ground and not merely for the use of the premises, it is not rent properly so called, but purchase-money, — a part of the *corpus* of the estate and not of the profits issuing out of it.¹

Although it is purchase-money, the duty to pay is absolute and does not depend upon the existence of a corresponding amount of minerals, unless, of course, made so dependent by the terms of the lease.²

Whatever may be the nature of the estate granted, the rent is not dependent upon the taking of minerals, unless rendered so by the terms of the instrument creating it.

The remedies for non-payment of rent are an action on the contract in all cases; if the amount of the rent is dependent upon the amount of mineral taken, a bill for an account will lie. And if the consideration is a true rent, the ordinary remedy for the recovery of rent by distress is available by the landlord.

When a lease has been assigned by the lessee, even with the landlord's consent, the original lessee is not relieved from liability upon the covenants contained in the lease. The covenant to pay rent being one which runs with the land, the assignee is liable thereon. But of course he is liable only for rent which accrues after the assignment.³

In the absence of other arrangement by the terms of the lease or contract, where the consideration is in the shape of a royalty, or is otherwise fixed by the amount of minerals mined, it is the duty of the lessee to ascertain that amount. The returns of the lessee as to the amount mined, if accepted by the lessor, are conclusive on him in the absence of full and satisfactory evidence of fraud or mistake. If they are not accepted, or settlements are not made upon them without objection, their correctness may be assailed by the lessor in the same manner as may that of any other account. In such case expert testimony is admissible to

¹ In Indiana, owners of land and others interested in the rental or royalty of coal mined have a lien therefor provided by statute. Rev. Stat. 1888, sec. 5471.

² See Chap. III., Div. I.

³ See further, Chap. IV., Div. I., where the cases are collected.

show the territory mined and the amount which it should have yielded.

In Ohio the interest of lessors of coal mines is protected by statute, which gives the right of access to and examination of the machinery by which the coal is weighed, and also of the accounts thereof.¹

United States. *Lehigh Zinc & Iron Co. v. Bamford*, 150, 665 (1893). A lease of a zinc mine and concentrating works for ten years was upon a specified royalty per ton for ore concentrated, payable annually, but in case the royalty in any one year fell below \$1,000, then such a sum was to be paid as to make the annual rent that year amount to \$1,000. Held, that the lease intended the payment of the minimum rent of \$1,000 should be made annually, and should not be postponed to the end of the term.

Illinois. *Manning v. Frazier*, 96, 279 (1880). Where the owner of land bargains and sells all the mineral thereunder, and grants to the vendee the right to enter and search for said minerals, and to dig, mine, explore, and occupy with the necessary structures, and to mine and remove all the coal, limestone, etc., for which the vendee agrees to pay a stipulated price per ton for the various minerals removed, payable quarterly, the grantor will have a vendor's lien on the minerals not mined and removed, for unpaid purchase-money, which he may enforce by a sale of the minerals in the ground. The stipulated price is purchase-money of the real estate, not of the minerals removed. It is not a collateral covenant.

The payment of so much per ton is only a mode of ascertainment of the purchase-money, the amount due each quarter depending upon the quantity mined during the preceding three months.

Consolidated Coal Co. v. Peers, 150, 344 (1894). In consideration of the lease of the sole right to mine coal, the lessee agreed to begin mining coal from said land within twelve months from the date of said lease, and to guarantee the lessor a yearly royalty of not less than \$1,200 after the expiration of twelve months from that date; and that if after the expiration of one year no coal should be mined from said tract of land, and the said lessee should pay the monthly instalments of \$100, said payment should be considered as advanced royalty, and said lessee was to have the right to mine coal sufficient to make the amount of coal mined equal the amount of royalty paid, provided that the royalty paid should not be less than \$100 per month; that said lessee should carry on the work in a good and workmanlike manner, and take as much coal from said land as a proper regard for the safety of the mine would admit, and to pay the plaintiffs a royalty of three-eighths of a cent per bushel for all coal mined, etc., and that such royalty should be paid monthly on the twentieth day of the month for coal mined the preceding month.

¹ Rev. Stat. 1890, sec. 305.

The last clause referred to the payment of \$1,200 a year as well as to the three-eighths of a cent per bushel. Payments of \$100 fell due on the twentieth of each month, and could be sued for as they fell due. The provision that lessee should pay \$1,200 a year whether coal was mined or not, was a reasonable one, and could be enforced as liquidated damages. It is not necessary, in order to recover this rent, to allege and prove that there was minable coal that defendant ought to have taken out, in the absence of any covenant as to the extent of the coal in the land leased.

Indiana. *McDowell v. Hendrix*, 67, 518 (1879). Royalties and

rent accruing on a lease of land, for the purpose of mining for coal, after the death of the lessor go to the heir and not to the executor, and those accruing before the death go to the executor.

Iowa. *Reed v. Beck*, 66, 21 (1885). Lease of land for mining

purposes provided for the payment of a royalty on coal mined and taken out by the lessee, and an agreement by the lessee to mine to an extent necessary to make the rent \$500 a year. And in case the rent or royalty for coal mined during any period of six months should amount to less than \$250, the lessee agreed to advance the difference, to apply, however, on future royalties, and also "on the first day of each month (after the shaft is opened and mining commenced) to pay the lessor the amount due from the previous month." *Held*, that though an action might lie against the lessee for failure to open the mine, an action to recover rent would not lie until the shaft was opened and mining commenced.

Steele v. Mills, 68, 406 (1886). The assignment of the monthly royalties payable as rent under a coal lease is not the assignment of an open account (Code, sec. 2087), but of a right under a contract (Code, sec. 2082), and the assignor is bound only by equities which the lessee had against the assignor before notice of the assignment, and not by equities arising before suit was brought upon the assignment.

Carr v. Whitebreast Fuel Co., 88, 136 (1898). Lessee was to pay a royalty upon the clean, merchantable salable coal, but none upon nut, pea, and slack coal. The means used at the time the lease was made for separating the lump from the fine coal, including the screens, were found to be ineffectual for the purpose, and screens of another pattern were adopted. *Held*, the change of screens was authorized by the facts, and in any event the lessor had no ground of complaint, in the absence of proof, that his royalty was reduced thereby.

Maryland. *Cross v. Tome*, 14, 247 (1859). The rent of a quarry at a certain number of cents per perch (the amount varying with each and every perch of stone quarried) is a *certain money rent* within the meaning of the act of 1834, ch. 192, regulating the mode of distraining for rent.

Missouri. *Austin v. Huntsville C. & M. Co.*, 72, 535 (1880). The recovery of judgment for rents by a lessor against lessee of coal does not vest the property in the coal in the lessor, the recovery being upon the terms of the lease, not upon entry. This is true whether the judgment is satisfied or not.

Ohio. *Burgner v. Humphrey*, 41, 340 (1884). The compensation of the grantor under the terms of the contract was to be regulated by the amount mined, which was to be ascertained by reference to the

bills of the diggers and the books of the grantees. Upon allegation that the former were destroyed and the latter false, evidence of engineers was admissible to prove the number of acres mined and the number of tons which each acre should yield, to show the inaccuracy of the books.

Greenough's Ap., 9, 18 (1848). A claim for money, payable as rent, by a co-tenant for the privilege of taking coal out of a mine at so much per cubic yard, is a preferred debt.

"The question then is, whether the appellant's claim was a privileged one; and that depends upon the nature of their contract with the decedent. It was the grant of the right to mine coal at so much per ton; and the *redditus* was consequently a certain rent for which a distress might have been made. In substance, it was as distinctly a lease as that in *Offerman v. Starr*; nor is that case distinguishable from this in any respect, except that in one the lease was to a co-tenant, and in the other it was to a stranger. But it is certain that one joint tenant or tenant in common may lease his part to his fellow."

Tiley v. Moyers, 43, 404 (1862). Where the rent of a coal bank is for the first year, the putting of the bank in good order and thereafter a fixed sum per bushel mined, and by the terms of the lease *no one else was to have the privilege of taking coal*, it is not an eviction for the lessor to enter and take coal from the bank without interrupting the actual operations of the lessee. But *such action was a breach of covenant* entitling the lessee to set off damages in an action for rent. The rent was not the consideration of the possession, but the equivalent of the coal actually taken.

Sillingsford v. Good, 95, 25 (1880). One who leased a coal tract on royalty made monthly returns, purporting to be correct statements of coal mined and payments thereon, which were received without objection.

These were conclusive on the lessor, in the absence of full and satisfactory evidence of fraud or mistake. They were in the nature of settlements.

Duff's Ap., 21 W. N. C. 491 (1888). Where a tract of coal land is let for mining purposes at an agreed rate of royalty per ton, *the royalty has none of the qualities of rent*. It is not paid for the use of the tract by a tenant, *but for the coal*, the chief article of value in it, by a purchaser. *Royalties are a part of the corpus of the estate, and not a profit issuing out of it*. Every ton of coal mined reduces the value of the tract and lessens the security of a mortgage upon it.

Fairchild v. Fairchild, 9 Atl. Rep. 255 (1887). A demise of *all the coal under the surface of a specified piece of land is a sale of the coal*, and the sums due by the lessee to the lessor as royalties are not rents, but purchase-money of real estate. Royalty accruing after lessor's death is collectible by his administrators and distributable as personalty. It is not the profits of realty, and is not the subject of curtesy.

Oram's Estate, 5 Kulp, 423 (1889), Com. Pleas. Royalty on coal lease, in syllabus called "a contract for privilege of mining coal," is rent, and, as such, the landlord is entitled to a preference therefor out of proceeds of sheriff's sale.¹

Drake v. Lacoe, 157, 17 (1898). By the terms of a coal lease lessee agreed to pay ten cents per ton "miner's weight" for all coal

¹ A contrary view is taken in a *dictum* by Penrose, J., in *Heckman's Est.*, 15 Pa. C. C. R. 264 (1894).

mined. In the absence of evidence of an agreement as to a different meaning, this is "such quantity of coal as was computed at a ton in paying the miner who mined by the ton." The master found from the evidence that it meant such quantity of coal, slate, and dirt as was agreed upon between the operators and miners to be sufficient to make a ton of prepared coal. It appeared that about twenty per cent of the mine wagons' contents was deducted as worthless, and the miner was paid for the remainder as coal. The lessees paid royalties on the number of tons prepared for market in this way. The lessors received full statements of the coal thus mined during all the years that returns were made to them, and made no objection as to their accuracy until suit was brought. *Held*, that they could not recover for a greater number of tons.

Lehigh & Wilkes-Barre C. Co. v. Wright, 177, 387 (1896). A lease of all the coal in a certain tract until it should be mined and removed, contained an agreement to pay a royalty and also an annual minimum rental, whether coal was mined or not, and a provision for forfeiture for failure to do so. This was a sale of the coal, and the rental was the purchase-money therefor. But the duty to pay was absolute and not dependent upon the existence of a corresponding amount of coal. The continuance of the estate depended on the payment of the rent. A failure to pay ended the estate.

Shoemaker v. Mt. Lookout C. Co., 177, 405 (1896). Lessees in a coal lease were to pay a royalty of twenty-five cents per ton "when such coal sells at an average of two dollars per ton or less at the breaker, and when the said coal shall sell at the breaker for more than two dollars per ton," then an additional royalty of twenty per cent of such excess. In calculating the price at the breaker lessees were entitled to deduct commissions paid to sales agents. This applied to a commission paid to agents in consideration of their relinquishing a contract so that lessees might have the advantage of selling direct.

Collins v. Mechling, 1 Super. Ct. 594 (1896). By the terms of an oil and gas lease the lessee was to pay the lessor \$10 a month until the completion of the well, and one-eighth of the product when it was less than one hundred barrels a day; and it was also provided that if the well should produce oil in paying quantities, the lessee should pay \$600 in thirty days from the time the well was completed. When the well was completed, it commenced to flow at the rate of twenty barrels an hour, and continued with a decreasing product for about four months, when it entirely ceased to yield. *Held*, that the lessor might recover the \$600. The intention was that it should become due if the well produced during thirty days such an amount as would render it profitable to operate it during that period. It was not necessary that it should produce enough to repay the cost of sinking the well.

Childs v. Hurd, 32, 66 (1889). Where lands are leased for the purpose of mining coal and iron in consideration of a royalty which is to be paid before the coal or iron is removed from the premises, the lessor is entitled to be paid before the mortgagee of the lease, out of any funds in the hands of the lessee's agents arising from the sale of coal and iron and paid into court.

The lessee was treated as a mortgagor in possession who was entitled to rents and profits as against the mortgagee, the lien of the latter affecting only the *corpus* of the estate.

III. THE PREMISES.

A. *Rights growing out of the Description or Nature of these or Incident thereto.*

The general rules governing the construction of the description in conveyances are applied in the case of mining leases. Where there is any doubt as to what has been demised, the question is one of intention which must be determined by construing all parts of the lease together. Where boundaries are given with reference to fixed and known objects, they control courses and distances.

Whenever disputes occur because of some ambiguity arising out of a vague description of the premises which are to be mined upon, or from the peculiar nature of these, the Courts endeavor to effectuate the intention of the parties at the time of making the lease.

But on the other hand, when it is plain from the written clauses that operations are to be conducted upon certain designated and described sites, the lessee will be made to carry on his operations within these boundaries, and parol evidence is inadmissible to show the contrary in the absence of fraud or mistake. In the case of oil leases, however, where the lessee is restricted to operating at designated sites on the premises, he has the protection of the entire premises; no one else may bore thereon. Sometimes such a protection outside of the premises is conferred in terms by the lease. The extent of the demise often becomes a question of fact for the jury, but only when the meaning of the language cannot be determined from the instrument itself, but can be arrived at only by ascertainment of surrounding circumstances. Then the question is one not of construction, but of the solution of a latent ambiguity, existing in words which of themselves are plain in meaning.

Alabama. *Pierce v. Tidwell*, 81, 299 (1886). The Tidwells agreed with Pierce for the consideration of \$20 per month, to give him, his heirs and assigns, "the exclusive right to possession of all minerals that underlie their land which forms part of the mine called and known as the P. W. Coal Mine," and to all the timber growing thereon suitable for mining purposes; also a right of way to and from the mines whenever required. It was further agreed that "the said \$20 shall be paid only as long as the said mine is worked to advantage." *Held*, the words "said mine" mean the P. W. Coal Mine, and not merely the part of it upon the Tidwell tract.

P. mined on three tracts, the Tidwell being one, his whole operation being known as the "P. W. Coal Mines." Having exhausted the coal on the Tidwell tract, he continued to use the right of way over it, but refused to pay the sum of \$20 per month agreed. *Held*, he was bound to do so, so long as he worked the P. W. Coal Mine to advantage or profit.

California. *Dietz v. Mission Transfer Co.*, 95, 92 (1892). A deed of a part of a tract of land excepted "all oils, petroleum, asphaltum, and other kindred mineral substances," and "the right to erect machinery, sink wells, bore, tunnel, dig for, work on and remove the same from the premises," also rights of way, and to lay pipes.

The grantee of the balance of the tract and the reserved minerals was not confined to those portions where there were surface indications of oil, but might go upon the land to develop it and ascertain whether oil exists.

Illinois. *Kamphouse v. Gaffner*, 73, 453 (1874). Where boundaries are given with reference to fixed and known objects, they control courses and distances.

A lease of a one-half interest in that part of the lands of the estate of K., between G.'s "sand level and the range he is working now. Said claim is seventy-five feet wide, and is known as the old B. and R. Range. The ground hereby leased fronts on the slough, . . . and shall run from thence east on all the lands of said K. estate." "East" does not necessarily mean due east, but is controlled by the previous words designating the location. Evidence is admissible to show the location and course of the range already being worked by the lessee, for the purpose of applying the lease to its proper subject-matter, and explaining a latent ambiguity. The mines involved in this case were lead mines, upon the sides of a series of bluffs, the usual mode of mining which was by running levels or drifts horizontally from the slough into the bluffs, the ore being found in crevices in the rocks running back from the base of the bluffs. The position which seems to have the approval of the court is, that G., who started from a point on the bluff within the frontage named in his lease (in general form as above), might thence follow the crevice or range in an easterly direction though it crossed beyond a due east and west line extending from the point of the lessee's frontage nearest G.'s possession.

Indiana. *Indianapolis N. G. Co. v. Kibbey*, 135, 357 (1893). The owner of a tract of eighty acres granted to K.'s assignor twenty feet square of the same "for the purpose and exclusive right of a gas well on said twenty-foot square tract," with rights of way over and through the entire tract. The grantor further covenanted "not to drill or suffer or permit others to drill or put down any other gas well or wells on any part of said entire eighty-acre tract," except a single well for residence purposes for himself or his neighbors.

K. was entitled to an injunction against a stranger who had entered upon the eighty-acre tract and was sinking a gas well. He had a right to all the gas under the eighty-acre tract that could be obtained by boring within the twenty-foot square, save that which might be obtained from one well for the domestic use of the owner and his neighbors.

Iowa. *Oskaloosa College v. Western Union Fuel Co.*, 90, 380 (1894).

Where a mining lease preserves from mining the ground east and south of a building, mining is precluded in the square lying between southeast corners of the land lying directly east and south.

Massachusetts. *Chester Co. v. Lucas*, 112, 424 (1873). This was

an action of trespass to recover the value of emery and iron ore alleged to have been removed from plaintiff's land. Plaintiff was the grantee of the metals and minerals in a tract of land bounded "beginning at the centre of the vein of iron ore, on the line between Wright and Dewey," thence, etc. At the trial, the location of the grant being in dispute, there was conflicting evidence whether there was any such vein, and whether there were not more veins than one, and whether the parties agreed upon a line of rocks as marking the place of a supposed vein, and whether the vein, if any existed, was a vein of emery and not of iron. The judge charged, in substance, that if there was one vein of iron on the line between Wright and Dewey, that vein would be the starting point in the description of the deed, and parol evidence would not be admissible to affect it; but if there were more than one such vein, parol evidence would be admissible to show which vein was intended; if there was no vein, and the parties agreed upon certain rocks as marking the location of a vein, those rocks would be the starting point; if there was not a vein of iron ore, but was a vein of mineral supposed by the parties to be iron ore, and called in the deed a vein of iron ore, that vein would fix the starting point of the location. *Held*, that this charge appeared to be adapted to and sufficient to meet the different aspects of the case.

Pennsylvania. *Spencer v. Kunkle*, 2 Grant, 406 (1855). Where there were two leases, the first of coal mines, and the second of miners' houses, on a certain tract, and the latter by its express terms was made part of first, the two leases constitute but one entire demise, and goods and chattels on any part of the premises are liable to distress for rent of houses.

Tiley v. Moyers, 43, 404 (1862). Where a lease described the premises as "their coal bank and its appurtenances," and there was a dispute as to the extent of the demise, it was a question of fact for the jury.

Allison's Ap., 77, 221 (1874). In a lease of a lot of land "for the sole and only purpose of mining and excavating for petroleum, coal, rock, and carbon oil," and "a protection of ten rods on the east side" and "eight rods on the north side" of the lot, the "protection" includes the area on the northeast corner included by the extension of the outside lines of the "protections." The lessor or his assignee will be enjoined from boring for oil within this area, and a court of equity will award damages for the trespass and waste of so doing.

Mays v. Dwight, 82, 462 (1876). D. & A. leased to M. a tract of oil land, describing it, with one partly bored well thereon. M. agreed to sink this well deeper, and to deliver to the lessors one-fourth of its product. Both parties supposed this well to be upon the leased tract. It was afterwards discovered to be on an adjoining tract leased by S. to M., who thereupon offered to deliver possession of the premises leased to D. & A., and refused to pay the royalty. D. & A. filed a

bill for an account against M. As this was a case of mutual mistake against which equity will relieve, the bill was dismissed.

Freck v. Locust Mt. Coal Co., 86, 318 (1878). Where the lessor not only gives his tenant the power but makes it his duty to explore and mark a theoretical line upon his own premises, the tenant cannot be treated as a trespasser if in an honest attempt to ascertain the line he should chance to pass over it.

Rounsley v. Jones, 2 Walker, 112 (1883). A reservation of the ore on the west side of a tract which extends in a northwesterly direction, no division line being adopted, means the ore on the west of a line drawn through the middle of the tract in the direction of its greatest length, and not of a north and south line dividing it into two equal parts.

In this case, if the latter construction had been given, all the ore in the tract would have been "on the west side."

Hughes v. Coal Co., 104, 207 (1883). A conveyance of coal provided as follows: "The said party of the second part does agree to pay as follows: For each acre of good merchantable coal contained in that portion of the land which lies along the west side of the ravine on the east side of the S. property the sum of \$140 per acre, and for that upon the remainder the sum of \$70 per acre." The evidence showed that east of the S. property, beginning at the northern part and running south, there was only one ravine, but that this ravine separated into two about opposite the middle of the S. property, No. 1 running southeast, and No. 2 southwest. *Held*, that the deed presented no latent ambiguity, and that the construction thereof was for the court, which rightly decided that ravine No. 2, being the one nearest the S. property, and in such a position that it must be crossed by a line running east from said property to ravine No. 1, was the one intended in the conveyance.

Ashman v. Wigton, 20 W. N. C. 280 (1887). An agreement that one of the parties is to have the right to take coal on the north side of a gangway, to be run as provided in the agreement, does not mean that the line of the gangway is to be extended and become the boundary, but that the gangway itself is to be the dividing line, thus giving the right to mine only on the part of the tract which is bounded on the southwest by the gangway, and on the southeast by a line drawn from the south end of the gangway at right angles to its general direction to the eastern line of the tract.

Duffield v. Hue, 129, 94 (1889). Where the premises in a printed oil lease are described, but it is plain from the written clauses that the operations are to be conducted only on certain designated and described sites, the lessee is restricted to these sites. And parol evidence to the contrary is inadmissible in the absence of fraud or mistake.

Duffield v. Hue, 136, 602 (1890). The lessee in the above lease, however, has the protection of the entire premises, and equity has jurisdiction to restrain the lessor or others acting under him from drilling wells thereon outside of the designated sites, and thereby lessening the production of wells drilled by the lessee, such injury being destructive of his rights, and incapable of adequate remedy at law.

Lulay v. Barnes, 172, 331 (1896). By recorded articles of agreement R. sold to L. a tract of 128 acres, described by adjoiners, and also "the coal right in the northern hill, as far as the centre, between the southern and northern boundary," with a right of way. This passed a fee in the coal, the location of which could be established by parol evidence. It was error to hold that the conveyance failed because of the vagueness and uncertainty of the description.

Wisconsin. *Sobey v. Thomas*, 39, 317 (1876). An oral lease of the exclusive right to mine the "Watkins range or works" upon the lessor's land conveys a right not only to mine said range so far as it had been actually opened and worked, but also to follow it to the limits of the land. But such lease did not give the right to work a vein on another portion of the land between which and the former no connection was shown to exist within the said tract, although a connection had been traced by a circuitous course through the adjoining land of another. The "Watkins range" was a flat opening, the ores being found in a horizontal instead of a vertical seam. Though the original opening might have been connected with the second vein by drifting in a direction across the range, yet in the absence of proof this will not be presumed merely from the nature of the opening.

Ross v. Heathcock, 52, 557 (1881). For a consideration named defendant conveyed to a company for the purpose of mining and digging the mineral thereon, certain described tracts of land. These were described by government subdivisions, followed by the words "and known as the Heathcock range." This did not give the grantees the right to follow this range and mine thereon when it was traced or developed subsequently on other land belonging to the defendant. Nor is this affected by the fact that the parties at the time of entering into the contract were mistaken in the course of the range.

Nor is this right gained by the following subsequent conveyances or contracts:—

1. A lease of the right to construct a dam and maintain a water-course on the said land.

2. An adit lease giving the privilege of opening an adit or level thereon, with the privilege of sinking the necessary shafts to run said adit, and of following and digging after any mineral that the company might discover in running said adit or sinking said shafts, "but not to follow such mineral further east than where the said adit or level commences."

B. *Fixtures and Appurtenances.*

There is nothing peculiar to the law of mining on these subjects. For the principles involved, the reader must refer to the books on Real Estate Law, Conveyancing, and Landlord and Tenant. The plan of this work does not contemplate a discussion of them, but the principal cases in which these principles are

applied to mines and mining property are collected here as a convenient arrangement.¹

California. *Merritt v. Judd*, 14, 59 (1859). A steam engine, boiler, and pump, bedded into the ledge sufficiently to get a level, and covered by a shed for shelter, and used in working a mine, are fixtures of the class known as trade fixtures, removable by the tenant during the term, or so long as he holds under a right to consider himself a tenant. This right of removal may be controlled by agreement of the parties or by local usage.

Such machinery as described above is included in the term "improvements" in a provision in a lease that improvements were to go to the lessor on forfeiture.

Dietz v. Mission Transfer Co., 95, 92 (1892). The owner of a large ranch conveyed a part of the tract, excepting "all oils, petroleum, asphaltum, and other minerals," and then conveyed to another the rest of the ranch and the reserved minerals.

The grantee in the first deed "granted and sold" to the grantee in the second "all the buildings, tanks, derricks, pipes, pipe lines, fixtures, and all other personal property whatsoever," situate upon any portion of the ranch. This was not a mere conveyance of these as chattels, but gave the right to occupy sufficient land for the use of said property for the purposes and in the manner it had heretofore been operated.

Illinois. *Dobschuetz v. Holliday*, 82, 371 (1876). A steam-engine, machinery, and fixtures attached to the soil by a lessee thereof, for the purpose of hoisting coal from mines, including all boxes and necessary appurtenances, remain a part of the lessee's estate.

Hewitt v. General Elec. Co., 61 Ap. 168 (1895). Where the lessee of a mine puts into it a machine for mining coal without the intention of making it a part of the realty, but merely for the purpose of transacting the business of mining, and the machine may be removed without injury to the realty, it does not become a part of it.

Michigan. *Bewick v. Fletcher*, 41, 625 (1879). F. entered into an agreement with L., by which he put up machinery for boring a salt well on L.'s land, in consideration of which he was to have had a share of the property and business. The well was never sunk, and L. sold the land to B. *Held*, the machinery did not pass. "The machinery was put upon the ground to sink a well, which is a temporary purpose. It was not so attached to the freehold as not to be removed without injury, and therefore, on well-settled principles, it could not become realty without either being intended or especially adapted for permanent use as a part of the freehold."

Lake Superior Co. v. McCann, 86, 106 (1891). A lease of premises for the purpose of mining, etc., iron ore, provided that the lessee would at the termination thereof peaceably surrender the

¹ In California by statute certain things are declared to be affixed to a mine. Civ. Code 1895, sec. 1077. See "Mortgage of Leasehold," p. 140. Code 1885, sec. 661; and in Montana by

premises, etc., "and other improvements and erections that may be thereon, — engines, boilers, machinery, tools, implements, and other movable personal chattels excepted."

This made engines and boilers personal property as between the lessor and an execution creditor of lessee, and having been so made by the agreement, they cannot be treated as trade fixtures.

Audenried v. Woodward, 4 Dutcher, 265 (1860).

New Jersey. "It satisfactorily appears from the proofs that it was the business of the tenant of a colliery and not the landlord to provide a breaker for preparing the coal for market."

Davis v. Moss, 38, 346 (1861). A lease of the entire mining right of and to a certain piece of land, with the privilege of erecting the necessary machinery and buildings, passes so much of the surface as is necessary to the enjoyment of this right, and an engine erected on the surface is attached to the subject of the grant, and is subject to the law relating to fixtures.

Carey v. Bright, 58, 70 (1868). It is not error to refuse to charge a jury that a sale of all the seller's interest in a colliery included "all the movable property belonging to and used at this place in the mining of coal, and that the word 'colliery' is a collective compound including many things, and is not limited to the lease and fixtures of a tunnel, drift, shaft, slope, or vein from which the coal is mined."

A colliery is a place where coals are dug, and while many things about a colliery may be fixtures, and pass as a part of the freehold, mere loose movables about such an establishment, in the absence of any usage or general understanding, are not such.

Heffner v. Lewis, 73, 302 (1873). Plaintiff and defendant leased adjoining coal lands to the same lessee; and a tunnel was made through plaintiff's land to reach defendant's, upon which was the opening to the slope. A levy was made on the leasehold interest in defendant's land, with the appurtenances, consisting, among other things, of "the railroads in and about, and connected with the said mines." Whether this included the rails of a railroad laid in the tunnel was a question for the jury. These rails were personal property.

Williams' Ap., 1 Monaghan, 274 (1889). The sale of land having upon it a slate quarry and factory, carries with it as fixtures such articles as are necessary for the purpose of carrying on the business of mining and manufacturing slate, and were actually used for that purpose.

Montooth v. Gamble, 123, 240 (1888). By articles of agreement a coal plant, including chutes, tipples, sidings, and cars, with the coal under a tract of land, was sold and conveyed, the privilege of mining and removing the coal to continue not longer than for a specified term, the coal then unmined to revert to the vendor.

There was no covenant to repair nor to return anything upon the premises connected with the works, but the agreement contained a clause leasing to the vendee certain miners' houses for use while the coal was being mined, not longer than for the term specified; the vendee not to remove houses, shops, or other buildings.

In such case the agreement was an absolute conveyance of the coal plant and coal which should be mined, and the vendee had the right to remove the chutes, tipple, sidings, cars, and other appliances necessarily connected with the mining and transportation of the coal. The lessor could not maintain covenant, therefore, at the expiration of the lease.

Ritchie v. McAllister, 14 C. C. R. 267 (1894). A tramway, cars, scales, and tipple being upon defendant's land, placed there by him for use in mining, removing, and marketing limestone, and necessary for that purpose, and without which the limestone quarry would not be a quarry equipped for the purposes intended, are part and parcel of the realty.

Shellar v. Shivers, 171, 569 (1895). On Nov. 11, 1885, S. leased to A. for oil and gas purposes for "three years, or as much longer thereafter as oil or gas might be found in paying quantities," lessee to have "the right to remove at any time any and all machinery, oil-well supplies, or appurtenances of any kind belonging to the lessee." The lessee sunk a well in 1887, but, failing to find oil, abandoned the lease. In October, 1892, he entered for the purpose of taking the casing out of the hole that had been drilled, and removing other fixtures that had been used in drilling the same. He was held to be a trespasser, no oil or gas having been found in paying quantities. The lease expired on Nov. 11, 1888. The casing, the derrick, and other appliances used in drilling and operating are trade fixtures, and can be removed by the lessee during the term of the lease. The right to remove fixtures at any time given by the lease did not enlarge the right of the lessee. The right to enter at any time and to remove machinery at any time was predicated to that part of the term that was uncertain, — that is, after three years. The lessee had the right at any time to enter and drill additional wells if oil or gas was being produced in paying quantities, in which case, the tenancy being uncertain in duration, the tenant would have a reasonable time for the removal of the fixtures. Four years was not a reasonable time.

IV. THE SUBJECT OF THE LEASE AND THE RIGHT OF THE LESSEE TO MINERALS NOT ENUMERATED IN HIS LEASE.

It seems clear that when one or more minerals are mentioned in the lease, the lessee will be confined to the extraction of these alone, and if in the course of mining he extract others, he will be held liable to compensation and an account for their value to the lessor, and will be enjoined from further removal of them. This is true whether the unenumerated minerals escape by reason of their own force (as is frequently the case, when, in boring for oil, natural gas rises to the surface and is appropriated), or are purposely or accidentally removed by the labor of the lessee.

A contrary rule, however, has been adopted in West Virginia as to natural gas.¹

In determining what is included in a lease, the familiar rules of construction are applied. The grant is construed most strongly against the grantor. The whole contract must be considered in arriving at the meaning of any of its parts. Terms are to be understood in their plain, ordinary, and popular sense, unless they have acquired a particular technical sense by the known usage of trade. They are to be construed with reference to their commercial and their scientific import. This rule is of especial importance when the question arises whether a specific mineral is included in a general designation.

Terms descriptive of the mineral granted or demised must also be construed with reference to their meaning at the time of the execution of the lease. They are to be construed to include only those in common use and commonly known by such terms at that time. Minerals which by subsequent discoveries of science are brought within the definition of the terms used are not included, if not so known at the date of the grant. If, however, the lease shows an intention to contract upon the basis of the possibility of such subsequent discoveries, this rule is not applied.

Though a particular mineral was not known to exist at the time of the grant, it will pass thereby if it is fairly included in the general terms used.

Michigan. *Deer Lake Co. v. Mich. L. & I. Co.*, 89, 180 (1891). A deed contained a reservation of "all mines and ores of metals that are now or may be hereafter found on the said lands, with the right . . . to mine and carry away the mineral thereon." At the time no marble or serpentine was known to exist in the country, iron being the only valuable mineral found in that region. The reservation was held to cover only "mines and ores of metals and minerals in common use, and commonly known as such," and not to include marble, serpentine, or other building material.

New Jersey. *Zinc Co. v. Franklinite Co.*, 13 Eq. 322 (1861). Under a grant of "all the zinc and other ores, except franklinite and iron ores," in a certain tract, the exception was not

¹ The West Virginia case applies only to natural gas, and that for the reason that there can be no property therein. Though the reasoning of this case might extend to petroleum, it could not to the ordinary minerals.

While it is true that there can be no

property in the minerals *feræ naturæ* until they are reduced to possession, yet when reduced to possession by a tenant it does not follow that the property is his. This is a proper case for the application of the principle that the tenant's possession is the possession of his landlord.

confined to franklinite and iron ores where they existed separate and distinct, and apart from the zinc. The terms "zinc ores" and "franklinite and iron ores" were used as descriptions of the land granted and reserved. The former meant those veins in which other zinc ores predominated, the latter those in which franklinite predominated, and which were known and designated as franklinite ore.

Reversed in Court of Errors and Appeals in *Zinc Co. v. Franklinite Co.*, 15 Eq. 418 (1862).

On the grounds: 1. The deed was to be construed most strongly against grantor.

2. The vein in question was the only one on the premises containing zinc, and it must be adjudged zinc ore; otherwise nothing would pass by the deed.

3. At the date of the deed the vein was called zinc ore.

Lehigh Zinc & Iron Co. v. N. J. Zinc & Iron Co., 55 Law, 350 (1893). F. conveyed to plaintiff's grantor "all the zinc, copper, lead, silver, and gold ores, and also all other metals or ores containing metals, except the metal or ore called franklinite and iron ore when it exists separate from the zinc existing, found, or to be found" on certain land. F. then conveyed to defendant's grantor "all the reserved iron ore called franklinite, and all the other reserved ores and metals not granted and conveyed to" plaintiff's grantor. *Held*, "in the plaintiff's title are all veins, strata, or masses of zinc ore which are capable of being mined, and all veins, strata, or masses of franklinite and iron ores which are not 'separate from the zinc' and fit to be mined; in the defendant's title are only those veins, strata, and masses of franklinite and iron ores which are 'separate from the zinc' and are fit for mining."

"Zinc" in this phrase means veins, strata, or masses of zinc ore in quantity and richness worth mining for zinc.

"These deeds speak also with reference to the time of their execution, and are to be applied to their subject-matter now as they would have been applied then. If a specified vein, stratum, or mass of franklinite can be removed without interfering with any zinc ore which in quantity or richness was worth mining for zinc, that franklinite or iron ore would then, under our view of these deeds, have been excepted from the plaintiff's title, and consequently it must be excepted now. No advance in the arts and sciences can extend those grants over any portions of the Mine Hill farm, which they would not at their date have been deemed to embrace by then applying to their terms and their subject matter correct rules of construction."

Defendant offered to prove that the vein from which the ore in suit was taken was in 1848 usually called franklinite; that although this vein was then known to contain certain compounds of zinc mixed with the franklinite, yet these were then worthless as zinc ore, and were for that reason rejected by plaintiff's grantor, while it held the plaintiff's title; that of all the ores hitherto discovered on the Mine Hill farm, the only zinc ore then deemed commercially valuable was the red oxide of zinc or red zinc ore, which is scarcely found in the ore worked by the defendant; that this vein was then available only as an iron ore, and did not become useful in the arts for the manufacture of zinc until

1866; and that those holding plaintiff's title have always acquiesced in the occupation of this mine by those holding defendant's title. This was admissible.

Armstrong v. Lake Champlain Granite Co., 147, 495 New York. (1895).

By deed of March 30, 1871, there was conveyed to plaintiff's grantor "all the mineral ores" on a tract, "together with all needed ways and privileges for mining and raising and removing said mineral ores," etc. By deed of May 18, 1871, between the same parties, without recital of the first deed, but for the same consideration, there was conveyed "all the mineral and ores (on the same premises), with the right to mine and remove the same; also, the right to sink shafts, and sufficient surface to erect suitable buildings for machinery and other buildings necessary and usual for mining purposes, and to make explorations for minerals and ores, saving reservations to the State of New York."

Held, the first deed did not pass a deposit of granite. The term "minerals" in the second deed, standing alone, would have passed such a deposit, but the context indicated that the parties had in view only such minerals as are to be got by mining in the ordinary sense; that is, by underground and not by open workings. Consequently the deposit of granite did not pass by either deed.

Gibson v. Tyson, 5 Watts, 34 (1836). A reservation in a deed of conveyance of "all mineral or magnesia of any kind, . . . with all bricks and blocks of soapstone as I, the said B., may want for my own use," entitles the grantor to chromate of iron afterwards found.

Kier v. Peterson, 41, 357 (1861). The lessee of land leased for the purpose, and with the privilege, of boring salt wells and manufacturing salt, so long as the contemplated salt well should be carried on, under certain provisions for forfeiture, and for a rent of every twelfth barrel of salt manufactured, is entitled to petroleum which rises to the surface with the salt water. Trover by the lessor for this petroleum will not lie.

Woodward, J., concurred in the decision but not in the reason. He held that trover was an improper action, because the lessee, though having no right of property, had the right of possession of the petroleum, as necessary, in order to separate the salt water. But the lessee was entitled to compensation and an account for the oil.

Kitchen v. Smith, 101, 452 (1882). Trunkay, J., was of opinion that a lessee under an oil lease might not conduct gas away from the land and appropriate it to his own use. "I think the dissenting opinion by Woodward, J. (*Kier v. Peterson*, *supra*), is sustained by his reasoning and the authorities therein cited. Gas often escapes in large quantities from oil wells, and is of great value for fuel. It is conducted to towns and extensively used in mills and dwelling-houses. Its value may greatly exceed the value of the oil produced. *That a tenant who has only the right to take oil or salt may conduct away the gas and appropriate it to his own use, seems to me an arbitrary conclusion.*"

Erwin's Ap., 20 W. N. C. 278 (1887). A contract was made for the exclusive right to all the iron ore on a certain tract of land, with the right to wash on said premises such ore as should require washing,

a certain royalty per ton to be paid for each ton of clean merchantable iron ore taken. For some time the refuse from the washing of the ore was allowed to accumulate in a dam, being considered of no value. Its utility for the manufacture of paint having been discovered, the lessee proposed to remove it, and the lessor filed a bill to restrain such removal. The testimony of experts and others was that while containing iron ore, and so classified by scientists, this refuse matter was commercially known as ochre.

Held, that the iron ore intended by the contract was the iron ore at that time mined with a well-known use and application, and that the crude ochre in the dam did not pass under the terms of the lease.

Doster v. Friedensville Zinc Co., 140, 147 (1891). A lease was granted "for the purpose of searching for minerals and fossil substances, and conducting mining and quarrying operations to any extent he might deem advisable;" the lessee to pay forty cents per ton "for all zinc ores, sulphurets of zinc, and iron ores," and to have the right to separate clean sulphuret ores from the rock, and pay only for the clean ore; and in case any other than zinc ores were removed, they were to be paid for at the same rate. In the process of extracting the ore, the rock was crushed and washed, and the refuse, which contained seven and a half per cent of zinc ore, was treated as waste. Subsequently it was discovered that this mineral was valuable in the manufacture of paving blocks. It was held to be the property of the lessor, and the lessee having sold it, had to account for its price, and was enjoined from further removal of it. The purpose of the lease was concerning ores only.

Moody v. Alexander, 145, 571 (1892). A vendor contracted in writing to convey to the vendee a certain tract of land, reserving "all oil and gas in or under the said land, with free mining privileges of all kinds, right of way for roads of all kinds, also free ingress and egress over, into, upon, and under said lands," compensation to be made for any land used in, and all damages caused by, his "mining operations." By the terms of the contract the only minerals excepted out of the grant were oil and gas. The phrase "mining privileges" was referable to them, applying to the processes and means of obtaining oil and gas, and did not extend the exception to coal, iron, and other substances not named, especially in view of the rule that a grant is to be construed most strongly against the grantor.

Lance v. L. & W. Coal Co., 163, 84 (1894). A lease of all the anthracite coal under a certain tract provided that the lessee should pay a royalty on all coal mined that would pass over a five-eighths of an inch mesh, and that the lessor should have all the culm or refuse coal from the mines, and should have the right to enter upon the premises at any time and remove the same, but that the lessees might use so much of the culm as might be necessary for any purpose about their works.

At the time the lease was made no general market existed for coal that would not pass over a five-eighths mesh. Some of this subsequently becoming marketable, it was sold by the lessee. *Held*, they were not bound to account therefor to the lessor. He was not entitled to all the coal which passed through a screen with a five-eighths inch

mesh, but only to refuse coal; "that is to say, to coal refused by the lessee because it was unsalable, and which of necessity, to make room for the operation of the works, was removed and thrown into a pile. The lease included all the coal on the land, and the provision as to sizes on which no royalty was to be paid was a stipulation in favor of the lessee, not a reservation of anything of value by the lessor."

The piles of refuse were regarded as of no value, but the belief existed that in the future, means might be devised to utilize the large quantities of good coal that they contained. The lease was negotiated upon this basis.

Pearne v. Coal Creek M. & M. Co., 90, 619 (1891). A Tennessee. deed describing a tract of land, and conveying "three-fourths of the land and one-half the stone coal of the whole tract, . . . except the minerals of all the precious kinds, passes one-half the stone coal and three-fourths of all other metals not of the "precious kind."

Petroleum Co. v. Transportation Co., 28, 210 West Virginia. (1886). Natural gas is incapable of being absolute property, and is the subject of qualified property only, belonging to him who first appropriates it. A landlord leased to his tenant certain premises for the purpose of taking oil therefrom at a fixed royalty; the tenant opened a well which produced both oil and gas, the former in small quantities pumped from the well and for which the royalty was paid, and the latter in large quantities issuing by its own force from the well, and which was separated by the tenant and by means of pipes conducted beyond the leased premises, and sold or appropriated by the tenant to his own use. In an action brought by the landlord for an account of the value of the gas the tenant was held not accountable.

If the tenant had attempted to use the land to produce gas alone under the terms of the lease, his term would have been forfeited; or if the gas had not escaped of its own force, he would not have been permitted to pump it without the lessor's consent.

The appropriation of natural gas would not enter into the estimate of damages in an action of trespass.

CHAPTER IV.

ASSIGNMENT AND TERMINATION OF LEASE.

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| <p>I. Assignment of the Lease.</p> <p style="padding-left: 20px;">A. Mortgage of Leasehold.</p> <p>II. Termination of the Lease.</p> <p style="padding-left: 20px;">A. By Expiration of Term.</p> | <p>B. By Exhaustion of the Minerals.</p> <p>C. By Eviction.</p> <p>D. By Forfeiture.</p> <p>E. By Abandonment and Surrender.</p> |
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I. ASSIGNMENT OF THE LEASE.

THE right of a lessee of minerals to assign in whole or in part his lease, or the rights and premises thereof, depends upon the nature of his estate. If his estate is an estate in fee in the minerals, he, of course, has all the powers of alienation and subdivision possessed by any other owner of a fee. If his lease is a lease of the land with appurtenant mining rights, he has likewise full powers of assignment and division. If, however, his estate is an incorporeal hereditament, he may assign it, but not divide it, unless the power is expressly conferred in the grant. If it is a mere license, the right is personal and incapable of assignment. This subject has already been incidentally referred to, and the authorities will be found under the different subdivisions of Chapter II. As between the assignee of a lease and the lessor the former acquires *all the rights of his assignor as they existed at the time of the assignment*, unless there is something in the lease to the contrary. So also he is bound *by all the covenants of the lease, and by all the obligations thereunder to which the lessee was subject at the date of assignment*. All covenants which by their terms or nature are continuous, or which, in other words, run with the land, are binding upon him during his ownership of the lease; but covenants by the lessee to do anything at a time prior to the date of the assignment do not bind him. He is not liable, therefore, for the lessee's breach thereof.

Owing to the privity of contract existing between the lessor and his lessee, the latter is not released from the covenants in his lease by reason of the subsequent assignment by him to a third

person. Between the latter and the lessor there exists privity of estate only. Therefore the assignee of a lease is liable only for the covenants which are broken while this privity of estate exists, and is not liable for those which were broken before such relation came into existence, or those which may be broken after its termination. Each successive assignee is liable only for the covenants broken while the title is held by him, owing to the absence of contract relations between him and the lessor. The rights of the assignee as between himself and his assignor are governed by the terms of the assignment.

United States. *In re Huddell*, 16 Fed. 373 (1883). A purchaser at sheriff's sale of the unexpired term of a coal lease takes the lessee's place under the lease, standing upon no higher plane in any respect, and, like the tenant, is liable for all taxes on improvements placed by himself on the land.

Illinois. *Consolidated Coal Co. v. Peers*, 150, 344 (1894). If it be conceded that the assignee of the lease is discharged from liability for subsequent breaches by his assignment of the lease, yet his transfer will not have the effect of discharging him for breaches of covenant already committed when there was a privity of estate between him and the lessor.

Peers v. Consolidated C. Co. of St. Louis, 59 Ap. 595 (1895). The lessee of the sole and exclusive right of mining coal on certain lands conveyed by deed all his interest in the premises, together with all rights, etc., under the lease to the defendant, who took the same subject to the agreements of the lease. *Held*, that defendant was liable to pay rent according to the terms of the lease, and was not relieved therefrom by an assignment to another.

Missouri. *Boydston v. Meacham*, 28 Ap. 494 (1888). The petition alleged a lease of coal lands by plaintiff to C., by which C. for himself and assigns agreed to pay one cent a bushel for all coal taken; a sale of a half interest in his lease by C. to defendant; the mining by defendant in connection with C. as partner; the amount of coal taken out by them; defendant's promise to pay, and the credits thereon. *Held*, this stated a cause of action.

Nevada. *Waters v. Stevenson*, 13, 157 (1878). This was trespass for ore extracted from plaintiff's mine by defendant.

W., the plaintiff, had leased the mine to A. on royalty. A. subsequently assigned the lease to W., and also his claim against S. *Held*, W. stood in the same relation to S. as his assignor A., and the latter was not entitled to deduct the amount of the royalty from the damages for the ore taken.

Pennsylvania. *Fisher v. Milliken*, 8, 111 (1848). By the lease of a mine the lessees covenanted to pay forty cents per load for the ore taken, but were at liberty to pay instead, at their election, to be made at the expiration of the first year, a certain amount per annum; but, in case they chose to pay for the ore by the

load, they were to take and pay for at least eight hundred loads. Not having elected to pay an annual sum, the covenant to take and pay for eight hundred loads became positive, absolute, and indefeasible.

The lessees having assigned to another, with whom the lessor made a new agreement: *Held*, not to release the original lessees.

The tenant is bound by a covenant to pay the rent, though he assign his lease with the landlord's consent, and though the latter accept the assignee for his tenant, and receive rent from him.

Lykens Valley Co. v. Dock, 62, 232 (1869). The lessee of coal mines made an assignment for the benefit of creditors, after which the lessor re-entered. The assignee was entitled to coal already mined lying in the mines, provided it could be removed without injury to the mine, and he could maintain trover therefor.

The measure of damages was the value of the coal lying in the mine.

The assignee had a right to use a railroad which was laid in the mine for the purpose of removing the coal, provided he did it so as not to interrupt, materially, the business of the owners.

Goddard's Ap., 1 Walker, 97 (1870). Lease of colliery provided that if lessees did not mine forty thousand tons in any one year between January 1 and December 31, they should nevertheless pay rent as if they had mined that amount.

On April 1, lessees, having mined no coal, sublet by lease, whereby the sub-tenants bound themselves to perform the covenants of the original lease. *Held*, they were bound to pay rent as if they mined forty thousand tons between April 1 and December 31.

Bradford Oil Co. v. Blair, 113, 83 (1886). A. leased his farm to B. to explore for and produce oil, at a royalty of one-eighth the production. The lease contained the following covenant: "To continue, with due diligence and without delay, to prosecute the business to success or abandonment; and if successful, to prosecute the same without interruption for the common benefit of the parties." B. assigned an interest in said lease to C. and D., and they, with B., assigned it to E. Two wells were bored on the farm, both of which were producing wells. E. refused to bore any other wells. In an action of covenant brought by A. against E. for breach of the covenant above quoted, *held*, that the said covenant was not the personal covenant of B., but a covenant that ran with the land, and therefore bound E.

Washington N. G. Co. v. Johnson, 123, 576 (1889). Owing to his privity of contract with the lessor, a lessee's liability upon his covenants in an oil and gas lease continues after his assignment of the lease; but an assignee of the lease being in privity of estate only with the lessor, is liable only upon covenants which are broken, while his privity of estate exists.

Each successive assignee would be liable upon covenants which are broken, while the title is held by him; but, because of the absence of any contract relations with the lessor, he would not be liable upon covenants broken before he obtained title or maturing after he had parted with it. An assignee of an oil and gas lease is not liable to the lessor upon a covenant of the lessee to drill a well upon the

demised premises, when the time for performance had elapsed before the assignee acquired title under the assignment.

"The case of the *Bradford Oil Co. v. Blair*, 113 Pa. 83, has been cited as sustaining a contrary doctrine, but an examination of it will show that it is clearly distinguishable from this case.

"The covenant which it was sought to enforce in that case was not for the completion of successive wells at successive dates, but it was for the commencement of the work of developing Blair's farm at a time certain, and to 'continue with due diligence and without delay to prosecute the business to success or abandonment, and, if successful, to prosecute the same without interruption.' Two wells were completed, and were successful oil wells. The assignee of the lease owned adjoining lands, upon which it was operating, and it stopped work on the Blair farm. The action rested on the breach of the covenant to prosecute the business of producing oil from the land of the lessor with due diligence and 'without interruption.' The obligation of a covenant to prosecute the business of developing the land of the lessor without delay and without interruption is a continuing one. This breach for which the Bradford Oil Co. was held liable was not that of some previous holder of the title, but its owner."¹

Smith v. Munhall, 139, 253 (1891). Plaintiff, lessee of certain tracts for purpose of operating for oil or gas, assigned to defendant the leases, in consideration of which it was agreed if the defendant or his assignees "operate under the said leaseholds, that on each of the leases he so operates, and if the oil is found in paying quantities, the said M. or assignees agree to pay S." \$100 for the leasehold upon which a paying well is found. Defendant surrendered the leases to the owners of the land and took new leases, containing the same provisions, which he assigned to innocent parties. This showed no cause of action for breach of contract. Plaintiff's claim for payment could be enforced *only when oil was found on the land in paying quantities*. In that case, by whomsoever found, recovery could be had *against defendant*.

Fennell v. Guffey, 139, 341 (1891). An oil lease provided that lessor should complete one well within six months, and upon failure to do so should pay the lessor "for such the sum of \$231 per annum, within three months after the time for completing the well," with a provision that a failure to complete the well or make the payment within such time should avoid the lease.

The lessee having assigned after the expiration of the six months, but within three months thereafter, the assignee was liable. *The covenant to pay \$231 per annum was not for breach of the contract to complete the well within six months, but was for rent which had not accrued until after the assignment, and ran with the land.*

Watt v. Dininny, 141, 22 (1891). Plaintiffs, owners of coal land, executed a mining lease, perpetual till exhaustion, the lessees to pay thirty cents per ton royalty on coal mined. Subsequently the plaintiffs, the lessees, and the defendants made a parol agreement, by which the defendants were to enter and mine coal and to pay the plaintiffs the same royalty.

¹ See also *Goss v. Fire Brick Co.*, 4 Superior Ct. 167 (1897).

The defendants, as found from the evidence, having mined coal from the lands of the plaintiffs, under the agreement made therefor with the consent of the lessees, they were liable for the royalty they had agreed to pay; and the plaintiffs were entitled to bring suit to recover the same directly against the defendants.

Guffey v. Clever, 146, 548 (1892). A lease of land for oil and gas production, with no clause authorizing an assignment thereof, provided that if oil or gas were found the lessee should have the refusal for three months of a lease of an adjoining tract of the lessor, on terms "that may be equal to the best terms offered by any other person or persons therefor."

The lease having been subsequently assigned, the lessor entered into a written contract with the assignee, providing for certain extensions of the time of performance and for the payment of increased royalties, and that the original lease "shall remain in full force in all particulars in which the same is not hereby modified."

The position that the assignment of the first lease did not carry with it the option for the second lease was untenable, in view of the new agreement between the lessor and the assignee, especially providing for the continuance of the unmodified covenants of the first lease; and the assignee was entitled to the new lease on the terms of the best *bona fide* offer made.

Williams v. Short, 155, 480 (1898). Covenant in an oil lease to pay royalty or a share of the product runs with the land, and is binding upon the assignee of the lease who has received his share of the product of the wells.

Aderhold v. Oil Well Supply Co., 158, 401 (1898). A purchaser of an oil lease at sheriff's sale takes subject to all the covenants and conditions contained in the lease, among others to a covenant to complete a well within six months, and, failing in this, to pay a rental of \$500 per year until such well is completed.

Comegys v. Russell, 175, 166 (1896). R. made a coal lease to D., by which it was provided that royalties should be paid every six months, and if the amount due at the end of any half year remained unpaid for twelve months thereafter, the lease was thereby forfeited, and the lessor was authorized to "enter and take possession without recourse to law." The lease was executed in 1887. On July 1, 1891, D. gave an option to plaintiffs to purchase his lease, one of the conditions being that they should test the character of the veins upon the tract by boring down through them. After the boring was done, plaintiffs in April, 1892, notified D. that they accepted his option. In July, 1893, plaintiffs called upon the lessor for the purpose of paying any royalties due. The lessor said there was nothing due; but if there were, he would not take it from the plaintiffs. In September, 1893, the lessor re-entered for the non-payment of royalties within twelve months after they had fallen due.

There was evidence that the lessor knew the plaintiffs were boring upon the land, and that he pointed out the lines of the tract to the plaintiffs while the boring was going on. *Held* (1), that the plaintiffs took D.'s lease subject to D.'s covenants, and they were bound to take notice of them; (2) that the fact that the lessor knew that the

plaintiffs were negotiating with D. gave them no rights as against the lessor, except such as D. himself had, and imposed no duties on the lessors toward them, except such as he was under towards his lessee under the terms of the lease; (3) that the plaintiffs knew and were bound to take notice of the fact that mining was going on under the lease, and that royalties were falling due each half year; (4) that the plaintiffs were bound to know whether the royalties were being paid, and what was the state of the accounts, the responsibility for which they were about to assume; (5) that as they had not paid or offered to pay the royalties they had no higher standing than their vendor so far as their contract rights were concerned; (6) that the lessor was not estopped as against the plaintiffs by the fact that he knew the boring was going on, or by what he said in July, 1893.

McGuire v. Wright, 18, 507 (1881). A sale of a lease does not carry with it oil that had theretofore been pumped from a well on the leased land.

Tipping v. Robbins, 64, 546 (1885). A voluntary association, of which defendant was a member, having a mining lease of a certain tract of land, obtained a similar lease of an adjoining tract, the property of the plaintiff, in order to extend a level or adit upon a body of lead ore, which adit they were running on the former tract. The defendant subsequently became owner of the former tract, and the association surrendered to him its right therein; but the lease of the plaintiff's lot was not assigned to him. *Held*, that the defendant acquired no right under said lease to extend the level upon the plaintiff's lot, and to dig and to remove ore therefrom.

A. Mortgage of Leasehold.

As a general thing the mineral estate is subject to the same rules as to mortgages as any other real estate.

In Pennsylvania, however, the mortgaging of leasehold interests has been made the subject of particular statutes.¹

Pennsylvania. *Sturtevant's Ap.*, 34, 149 (1859). Under the eighth section of the act of April 27, 1855, where a mortgage is executed of a leasehold estate, it is necessary, in order to give it priority as against an execution creditor of the mortgagor, that the lease should be recorded with the mortgage.

Ladley v. Creighton, 70, 490 (1872). Under act of April 27, 1855, sec. 8, recording such mortgage with a copy of lease and referring to the lease recorded with a former mortgage, *held*, to be a substantial compliance with the act.

Hosie v. Gray, 71, 198 (1872). Where a coal-lease mortgage provides for collection by *scire facias*, that writ may issue though there was no provision for such a remedy in the act of April 5, 1853, authorizing mortgages of coal leases in Schuylkill county.

¹ Acts of April 5, 1853, P. L. 295; 1861, P. L. 185. See also page 127, "Fixtures," April 27, 1855, P. L. 369; March 22, 1861, P. L. 185.

The act of April 3, 1868, gave the same remedies on coal-lease mortgages as on mortgages of real estate, and applied to actions previously begun.

Gill v. Weston, 110, 305 (1885). The lien of a leasehold mortgage duly acknowledged and recorded in accordance with the act of April 27, 1855, is not divested by a sheriff's sale upon a judgment subsequently recovered against the mortgagor. Such a mortgage is regulated by the same rules as govern the mortgage of a freehold interest.

Gill v. Weston, 110, 312 (1885). The act of April 25, 1855, provides for the mortgaging of a leasehold of "any colliery, mining lands, manufactory, or other premises." *Held*, that the act applied to and authorized a mortgage of a leasehold in oil land although the act was passed before petroleum was discovered.

Petroleum is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands.

First Nat. Bank v. Sheaffer, 149, 236 (1892). A coal lease mortgage in Schuylkill county under the acts of April 5, 1853, and March 22, 1861, is not discharged by a sheriff's sale under executions on judgments on claims for labor subsequently performed and other executions on ordinary claims, on the proceeds of which executions, these and other similar labor claims not reduced to judgment, were a preferred lien.

Baker v. Atherton, 15 C. C. R. 471 (1894). The word "fixture" in the act of April 27, 1855, and in a mortgage made under that act, is not to be construed in a strict and narrow sense, but in a comprehensive way, and will include mine cars and all such machinery and appliances as are essential to the operation of the colliery, but not prop timber.

West Virginia. Childs v. Hurd, 32, 66 (1889). See p. 122.

II. TERMINATION OF THE LEASE.

A. *By Expiration of Term.*

This is, of course, a matter which is usually determined by the terms of the instrument itself. When a lease is by parol, and there is a dispute as to the duration of the term, it becomes a question of fact for the jury. With regard to *notices to quit*, the same rules, generally speaking, obtain as in other leases.¹

The lessor may be estopped from setting up the termination of a lease where he has induced the lessee to make expenditures thereafter on the faith of its continuance.

Illinois. Coal Co. v. Schaefer, 31 Ap. 364 (1889). By lease, all the coal in certain described lands was demised, and three acres of surface for erection of works, buildings, etc. A notice to quit, describing all the surface lands and the three acres by metes and bounds, was sufficient.

¹ New Mexico, Act 26, 1891, p. 132.

Iowa. *Jenkins v. Clyde C. Co.*, 82, 618 (1891). A lease of coal lands provided that the same might be terminated upon thirty days' notice, if it should be found at any time impracticable for the lessee to profitably mine the same. There being no other provision in the lease for its termination, a notice by the lessee that he surrendered his rights "as provided for in the lease" is sufficient.

New York. *Eaton v. Wilcox*, 42 Hun, 61 (1886). The provision that the lessee should have and hold the premises for the term of "twelve years from this date, and as long as oil is found in paying quantities," does not limit the term to a period during which oil in paying quantities is found. The term fixed is for twelve years at least, and for as much longer as oil is found in paying quantities.

Pennsylvania. *Moore v. Miller*, 8, 272 (1848). Where a lease is by parol, and there is a dispute as to the duration of the term, the question is one of fact for the jury.

Riddle v. Mellon, 147, 30 (1892). Plaintiff made a lease to G. for oil and gas purposes "for, during, and until the full term of one year next ensuing . . . and as long as gas or oil is found in paying quantities or rental is paid." The lessee drilled a well within the year and found oil, but failed to produce it in paying quantities. He then assigned the lease to defendant, to whom, after the expiration of the year, plaintiff made the request that he drill the well deeper. This the defendant proceeded to do, and the plaintiff recognized his rights under the lease as still in force. The defendant failing to find oil in paying quantities in the well abandoned it. He then proceeded to drill another well, and plaintiff brought trespass against him. Oil in paying quantities was found in this second well. Plaintiff having, after the expiration of the year, encouraged and allowed defendant to expend money and labor on the premises, on the basis of the continuance of the lease, was estopped from asserting that it was at an end.

Nesbit v. Godfrey, 155, 251 (1893). On June 12, 1890, plaintiff executed and delivered an oil lease to defendants which was to continue "during and until the full term of twenty-one years next ensuing the day and year above written." The rent was seventy-five dollars per year in advance. The lessees had power to terminate the lease at any time when they found it would not pay them to continue it. They paid seventy-five dollars on June 12, 1890, and on June 12, 1891, notified plaintiff that they elected to terminate the lease. *Held*, that on June 12, 1891, defendants had entered upon their second year, and were liable for the rent of that year.

Western Penn. Gas Co. v. George, 161, 47 (1894). An oil lease, "for the purpose of drilling and operating for oil and gas," provided that the lessee should hold the leased premises during the term of two years from the date thereof, and as much longer as oil and gas were found in paying quantities or the rental paid thereon. The lessor was to receive one-eighth of the oil produced, and five hundred dollars per annum for each well from which gas should be obtained in paying quantities, and so long as it should be sold therefrom. The lease further provided that the lessee should commence a well within thirty days and complete it within ninety days, "or in default thereof pay to the party of the first part for further delay an annual rental of

sixty dollars, payable quarterly in advance on the premises from the time above specified for completing a well, until such well shall be completed. A failure to complete such well or pay said rental within the time specified, or within ten days thereafter, shall render this lease null and void." "It shall be optional with the lessee at any time either to drill the said well, to pay the said rental, or to forfeit and surrender this lease." *Held*, that the failure of the lessee to complete a well within the term of two years enabled the lessor to terminate the lease on the expiration of it, and that the lessee could not indefinitely continue the lease by payment of sixty dollars per annum after the expiration of the two years.

Balfour v. Russell, 167, 287 (1895). An oil and gas lease was for three years, or while oil or gas was produced in paying quantities. The lease excepted "four acres around the buildings, upon which no wells are to be drilled without the written consent of both parties hereto, the boundaries of which are to be designated and fixed by the party of the first part." The only producing wells under this lease were two, drilled within the limits of the reservation, which continued to produce oil in paying quantities after the expiration of the three years. The lessor consented in writing to the drilling of one of these, acquiesced in the drilling of the other, and received his share of the oil. The lease did not terminate at the end of three years.

Double v. Union H. & L. Co., 172, 388 (1896). A tract of land was leased for the purpose of operating for oil and gas "for the term and period of two years from the date hereof, and as much longer as oil and gas is found in paying quantities thereon . . . and should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of \$200 per year for such well, so long as the gas therefrom is sold." Gas was found in such quantities, and the lessor remained in possession after the expiration of two years. *Held*, he could not terminate the lease by merely ceasing to use the gas. In order to do so, he must also have notified the lessor that he had ceased to use the oil, and terminated and surrendered the lease.

McBee v. Loftis, 1 Strob. Eq. 90 (1845). The grantee of a right of mining who by the terms of the deed is bound to surrender the right at the end of a year, if he finds it unprofitable, and who by the end of the year indicates no intention to do so, cannot have his rights limited to one year.

Sheldon v. Davey, 42, 637 (1870). J. having a lease of and occupying a certain portion of S.'s slate quarry for a term of years, paying as rent therefor a stipulated price per square for all the slate quarried and manufactured therefrom, without obtaining S.'s consent occupied a certain other portion of the quarry adjacent to the leased premises for several years, and quarried and manufactured slate therefrom, paying S. therefor the same price per square as stipulated in the lease, and paid for that taken from the leased premises. *Held*, that such use and occupation of the portion of the quarry outside of the leased premises, under the circumstances of this case, did not constitute a tenancy from year to year, and that the only interest J. acquired outside of the leased premises was the right to take out

the slate from a section of the quarry which, with the knowledge and acquiescence of the owner, he had been to the expense of uncovering, and that he was not entitled as a matter of right to six months' notice to quit, but to a reasonable time to quarry and manufacture the slate he had so uncovered.¹

B. By Exhaustion of the Minerals.

The exhaustion of the minerals terminates the mineral estate. If the interest created is an incorporeal right or a license, whatever the limitation as to time contained in the instrument or contract, the right ceases when the subject thereof ceases to exist.

Where the interest is a fee in the minerals, their exhaustion is equivalent to the entire removal of the land which is the subject of the lessee's ownership; nothing remains but the space occupied by the minerals, which, in the absence of provision to the contrary in the lease, cannot be put to any use by the lessee without imposing a servitude upon the land of the surface owner. Of course the lease may, in a manner, be kept alive by covenants therein providing for the use of the chambers, shafts, etc., for the removal of minerals from other lands.

This subject will be treated of in Chap. XIX., Div. II., "Right of Way."

The termination of rights under a lease by the exhaustion of the minerals does not necessarily terminate the lessee's obligation to pay rent.²

Illinois. *Sholl v. German Coal Co.*, 139, 21 (1891). Where the owner of land conveyed a described piece thereof, and "also the privilege of mining for coal under" an adjoining tract of one acre, the grantee has no further rights under this latter clause after all the coal is mined from the one-acre tract.

He has then no right to pass over it from the first piece of land to another, upon which there is a mine.

Pennsylvania. *Park Co. v. Cummings*, 7 Leg. Gaz. 149 (1875). When land is conveyed with the reservation of the coal and other minerals and the right to remove the same, so soon as all the coal and other minerals are removed the surface owner resumes possession of the whole soil beneath the top surface of his lot to the lowest depth, and can prevent the use of any subjacent part for working the minerals on an adjoining lot.

See *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 293; *Stewart v. North Western C. & I. Co.*, 147 Pa. 612.

¹ On notice to quit in cases of mining licenses in Iowa and Missouri, see cases under Chap. II., Div. IV.

² See also Chap. III., Div. I.

C. *By Eviction.*

Technically an eviction does not terminate a lease, but only discharges the lessee from further payment of rent. But in the case of mines an eviction practically puts an end to the lessee's rights.

An eviction takes place where by an act of the lessor the lessee is expelled, or his possession so disturbed as to compel abandonment of the premises, or he is deprived of the beneficial enjoyment of the premises, or they are rendered unfit for the purposes for which they were leased. Any act, therefore, which prevents the lessee from taking the minerals, which under his lease he would be entitled to take, is an eviction.

Also an invasion of the premises by a third person with the consent or by the authority of the lessor, or his neglect to protect the lessee from encroachment which it is his duty to prevent, is an eviction. So is the expulsion by a third person under a judgment for the recovery of the premises based upon a paramount title. A mere action of ejectment, however, although followed by a writ of *estrepement* is not such.

Illinois. *Walker v. Tucker*, 70, 527 (1878). Where an agreement referring to certain lands, reciting that the party of the first part desired to lease to the party of the second part the right of mining coal thereon, demised "the farming lands described and mentioned," "together with the right to mine, dig, extract, and carry away coal . . . together with the enjoyment and occupation of so much of the surface as might be necessary to carry on the mining for coal:" *Held*, if the grantor prevented the grantee from using the farming land it would amount to an eviction. "If the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord the rent is thereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion." "If those acts amount to a clear indication of intention on the landlord's part that the tenant shall no longer continue to hold the premises, they would constitute an eviction."

Michigan. *Pendill v. Eells*, 67, 657 (1888). Entry by lessors, taking and retaining sufficient possession to prevent mining by lessees or their assignees of the mine, is an eviction, and relieves the lessees or their assignees from payment of rent.

Pennsylvania. *Tiley v. Moyers*, 43, 404 (1862). Where the rent of a coal bank is for the first year the putting of the bank in good order, and thereafter a fixed sum per bushel mined, and by the terms of the lease no one else was to have the privilege of taking coal, it is not an eviction for the lessor to enter and take coal from the bank without interrupting the actual operations of the lessee.

But such action was a breach of covenant entitling the lessee to set off damages in an action for rent.

"Eviction such as will suspend rent is more than a mere trespass by the lessor, or a breach in any other form of the implied covenant for quiet enjoyment: it is an actual expulsion of the lessee out of all or some part of the demised premises." "The rent was not the consideration of the possession, or of the timber leave or of the building privileges, or of all these together; but was the equivalent, the *redditus*, for the bushels of coal actually taken. Had Tiley been prevented from taking coals, that would have been an eviction, and would have suspended the rent, of course. What he was to pay was to be measured by what he should take in the bushel. *No coal, no rent*, says the lease in substance. The possession of the land and the privileges mentioned were incidental to the coal right, but no rent was fixed for them."

Schuykill & Dauphin Improvement & R. Co. v. Schmoele, 57, 271 (1868). An action of ejectment by a stranger, followed by a writ of estrepement, is not a breach of the covenant of quiet possession. It consequently does not furnish ground for an injunction against lessor from re-entering for condition broken.

"Every lease implies a covenant for quiet enjoyment. But it extends only to the possession, and its breach, like that for the warranty for title, arises only from eviction by means of title. It does not protect against the entry and ouster of a tortfeasor. Even the entry of the State, by virtue of her rights of eminent domain, incurs no breach of the covenant."

"The tenant has a right to call his landlord into his defence, and if eviction follows as the result of a failure to defend him, he can then refuse payment of the rent, and fall back upon his covenant for quiet enjoyment to recover his damages."

D. By Forfeiture.

Forfeiture here means the loss of the estate, occasioned by a violation of some of the covenants or conditions of the lease or contract. The law of forfeiture applicable to mining leases is the same as that applicable to other leases, but the subject is of such importance in this connection as to call for special treatment here. The covenants and conditions upon whose breach these forfeitures are almost always predicated are either to pay rent or royalty, or to work or test the mine either generally or in some particular way.

A forfeiture may occur upon the breach of either a condition subsequent or a covenant. In the former case it results from the failure to fulfil the condition. In the latter it occurs only where there is in terms a provision that the lease shall be forfeited or

become null and void upon such breach. Without such a provision a mere breach of covenant will not avoid the lease.¹

In North Carolina a forfeiture is enforced for breach of the implied obligation of the lessee to work the mines, and in *King v. Edwards*, 32 Ill. Ap. 558, the possibility of doing the same thing was recognized. This is contrary to all authority. The landlord's right to resume possession upon this ground should be based upon the lessee's abandonment, the relinquishment of his rights acquiesced in by the landlord.

The cases of *Petroleum Co. v. Coal Co.*, 89 Tenn. 381, and *Wickersham v. Zinc Co.*, 18 Kan. 481, would also have been better decided upon this ground than by twisting covenants into conditions in disregard of the rule that a provision is to be construed as a covenant rather than as the condition. On the other hand, where a lease provides that the breach of covenant shall be considered an abandonment, it being perfectly clear that a forfeiture is intended, the lease will be so construed.

Forfeiture is not a favorite of the law, and in order to permit a declaration thereof for breach of covenant, the right thereto must be distinctly reserved, the proof of the happening of the event upon which it is to be exercised must be clear, the right must be exercised promptly, and in equity the forfeiture must not be unconscionable. Where the right is disputed, equity will interfere by preliminary injunction to preserve the possession of the lessee and prevent the interference of the lessor. Likewise, upon the other hand, nothing less than a clear expression of intention that a provision shall be such, will make it a condition upon which the continuance of an estate depends. And where causes of forfeiture are expressed, other causes are not to be inferred.

Though it is frequently said that under such provisions the breach of a covenant renders the lease void, the opinion which now prevails is, that it is rendered voidable at the option of the lessor. The covenants were made for his benefit, and he may upon their breach exercise the right to declare the contract void, or, affirming its existence, bring an action thereon. It follows that the lessee cannot set up the forfeiture, although the lessor may have had ample ground for doing so, because he will not be allowed in this way to take advantage of his own wrong. If the

¹ In Missouri a forfeiture of a statutory license for failure to work is provided by Rev. Stat. 1889, secs. 7034-7. See above, Chap. II., Div. IV.

lessor therefore does not avail himself of the opportunity to terminate the lease it will continue.

The most common provisions of this kind are those in oil and gas leases, which is due to the fact of the uncertainty surrounding operations of this sort, and to the importance of delay in commencing operations, owing to the difference in the nature of these and of fixed minerals. These leases generally contain provisions for forfeiture in case of failure by the lessee to commence operations or complete wells within a fixed time, or simply to prosecute operations, which is held to mean with reasonable diligence or within a reasonable time. In case of such a failure the lessor is at liberty to treat the lease as void without re-entry or notice to the tenant. On the other hand, he has a right to treat it as valid and continuing, and may likewise without notice bring an action for breach of covenant, or for penalty under the provisions of the lease, and the lessee cannot set up the forfeiture as a defence. It is not admissible to show that a contrary construction has been put upon such provisions by both lessors and lessees, such construction being merely a misunderstanding, more or less general, of the law. The right of forfeiture is not abridged by the addition of a covenant to pay fixed damages for delay. But the provision for forfeiture may be dependent upon failure to prosecute work or upon failure to pay rent as an alternative, in which case a forfeiture is prevented by payment of rent, or, upon the other hand, it is in the power of the lessee to compel it by failing to do so.

Where time is not stipulated as essential, and a forfeiture for a breach of covenant which admits of accurate and full compensation is provided as a mere penalty, whose object is the enforcement of the performance of another and principal obligation, equity will relieve against it, and not permit its use for a different and inequitable purpose. Thus when a forfeiture for non-payment of rent was provided for the purpose of compelling the operation of the lease, and the lessee, who is operating diligently and at expense, by an oversight fails to pay promptly, a forfeiture will be relieved against.

The question of acquiescence is often raised, and this, where it is expressed or is clearly proven, of course alters the rule.

Mere silent acquiescence does not constitute a waiver of right of forfeiture. But any act showing an intention to abandon that

right, or which is inconsistent therewith (as an extension of the time of payment), does constitute such a waiver. It will not, except under very unusual circumstances (*Duffield v. Hue, infra*, etc.), be implied from the failure of the lessor to notify the lessee that he is not living up to the terms of his covenant. Even if notice of a forfeiture were required, which it is not, a conveyance or the execution and recording of a new lease to another party would be sufficient declaration of such intention on the part of the lessor.

Where the aid of chancery is required to enforce a forfeiture, such aid will not be given where the lessor is guilty of laches, although all the other elements necessary to the enforcement are present.¹

United States. *Adams v. Ore Knob Copper Co.*, 7 Fed. 634 (1880), C. C. W. D. N. C. Where lands were conveyed to parties upon the following conditions, to wit: that they at their own convenience and time, and at their own proper expense, make a fair test for minerals and metals on the aforesaid lands, and if any be found worth working, work the same and pay to the grantors one-fourth of the net profits, and this was the only consideration for the grant. *Held*, that this constituted a condition subsequent which the grantees should perform within a reasonable time, that it required a continuous performance, and if discontinued an unreasonable time it would work a forfeiture of the estate.

In such a case, when the grantors remained in possession of the premises, upon the breach of the condition they became revested with the estate conveyed, unless they waived the forfeiture, and there was no need of a clause reserving the right of re-entry for the breach.

Mere silent acquiescence in an act which had constituted a breach of an express condition would not amount to a waiver of the right of forfeiture for such breach.

Illinois. *King v. Edwards*, 32 Ap. 558 (1889). K. on November 11, 1887, leased to E. the coal and minerals under certain land, the lessee covenanting to pay as rent five cents per ton for all coal, etc., sold from said premises, "said rent to be paid as follows, to wit: The first days of January and July of each year."

It was also agreed that lessee should "have the privilege" to occupy the surface necessary for the erection of machinery, etc., for tramways, sinking shafts, etc. On April 14, 1888, lessee had not taken out any coal, etc., had not paid any rent, had erected no machinery and sunk no shaft on the property, and no mine had been opened, but lessee had also leased some adjoining land from other parties and had sunk a shaft thereon, and was running it towards the land in question

¹ Forfeiture upon distinct grounds, lecting to work the mine, is provided for apart from anything contained in the in Wisconsin by Ann. Stats., 1889, secs. lease, viz., defrauding the lessor or neg- 1647, 1649.

with a view to opening a mine thereon. The court below having found, as a fact, that the lessee was proceeding with this work with reasonable diligence, it was held that no forfeiture of the lease had taken place when lessor gave notice thereof on April 14, 1888.¹

Mickle v. Douglas, 75, 78 (1888). The lease provided for Iowa. forfeiture for non-payment of royalty, and also that new buildings placed upon the land by lessee might be reserved at the termination of the lease, "unless all right thereto has been forfeited by a forfeiture of this lease." *Held*, that the right to remove buildings within a reasonable time was not lost by forfeiture for non-payment of royalty. The forfeiture for non-payment was a forfeiture of the lease only, and it should clearly appear that it also provided for the forfeiture of the buildings before it can be declared so.

Wickersham v. Chicago Zinc Co., 18, 481 (1877). Under Kansas. a mining lease under royalty for the term of twelve years, by which it is provided that the lessee should have the right to commence mining coal at any time, and he contracted to do so as early as he could make the necessary preparations; the lessee, having failed to avail himself of his right for eighteen months, during which time the lessor notified him that the contract was forfeited, and sold the land to another, who developed the coal thereon, was estopped from asserting any rights under his lease.

It is assumed in this case that where nothing is done by the lessee under such a lease, a purchaser of the land, whose vendor had in turn purchased from the lessor, was not affected with constructive notice of the lease.²

Wakefield v. Sunday Lake M. Co., 85, 605 (1891). Michigan. The failure to pay royalties when due will not work a forfeiture, unless there is a provision in the lease that upon breach of such covenant it shall become void.

The lease in this case provided that in case of failure to pay royalty or rent at the times mentioned, or of the non-performance of any of the covenants made by the lessee, the lessor might re-enter and repossess the property and expel the lessor, etc., and after such re-entry the lease should become null and void. It was *held* that the right to re-enter might be waived or deferred by any act extending the time within which payment might be made. An assurance given at the time of the service of a notice to quit, that another notice would be given before any proceedings were taken, deferred the right of re-entry until such notice should be given.

Subsequent assurances given to lessee's officers as to the time in which royalties might be paid under the statute authorizing summary proceedings for the recovery of lands, further deferred the right of re-entry until such time elapsed or notice of abandonment of such proceedings was given. Giving notice to quit and such subsequent assurances was notice to lessee of lessor's election to proceed to recover possession under the statute, and there could then be no re-entry except pursuant to the statute, unless such proceedings were abandoned.

A court of equity will not recognize an entry made by collusion with lessee's servant, nor can a possession necessary to support a bill to

¹ See comment on p. 148.

² See comment on p. 148.

quiet title be predicated upon an entry secured by misrepresentation as to its purpose.

Upon restoration after dispossession by such an illegal re-entry, the lessor must account to the lessee for the ore taken out by him at its market value, less the royalty and the actual cost of operating the mine, and of permanent improvements made by him, and also money actually paid by him for labor claims against lessee's property.

Missouri. *Oliver v. Goetz*, 125, 370 (1894). Defendant leased to plaintiff for a term of thirty years a tract of land for the purpose of establishing manufactories thereon, of digging and quarrying stone or other mineral substances therefrom, and manufacturing therefrom such substances, etc., as he might see fit. Plaintiff failed to do any of these things, but after carrying away certain specimens of the minerals joined a pool by which he agreed not to work the minerals for three years. *Held*, he could not recover the land in ejectment. The lease only gave him a right of possession for the uses therein specified, and he had prevented himself from using the land for these purposes for three years; and after the expiration of that time a court of law will not assist him to obtain the benefits of the contract, because he had failed to demand possession within a reasonable time.

New York. *Allegheny Oil Co. v. Bradford Oil Co.*, 21 Hun, 26 (1880), affirmed in 86, 638. A lease of land for a term of years for the purpose of boring for oil and digging for minerals, the lessor reserving one-eighth of the product and the use of the land for purposes of tillage, with a provision that the lease shall become void unless the lessee shall commence to bore, dig, etc., or cause the same to be done, within nine months, is void upon the lessee's failure to comply with the provision and is not merely voidable. As the lessor continued to occupy the land it was not necessary for him to re-enter or give notice of his intention to enforce the forfeiture. Even if such notice were necessary, the execution and recording of a new lease to another party would be sufficient declaration of such intention.

Shepherd v. McCalmont Oil Co., 38 Hun, 37 (1885). N., the owner of land, entered into agreement with W., by which he conveyed to him, his heirs, executors, administrators, and assigns, the exclusive right of entering upon any part of the said land, of erecting buildings, engine, fixtures thereon, the right of way to and from the same for the purpose of searching for minerals, and to mine, bore, or excavate for oil or any other valuable volatile or mineral substance, and to carry on such mining, etc., to any extent he might deem advisable, but not to hold possession of any part of the land for any other purpose.

The consideration was one-tenth the product; and W. covenanted to commence boring or excavating, etc., within one year, or as early as practicable thereafter as he might deem expedient, or forfeit all right under and by virtue of the agreement. N. reserved the right to till the land. The above agreement was made in 1865. In the same year W. assigned to the plaintiff. In 1867 N. conveyed to R., without reservation, who in 1881 conveyed to M., who conveyed to defendant. Neither W. nor plaintiff ever entered upon the land or took any steps to exercise their rights under the agreement until 1881, after title acquired by defendant. The plaintiff could not *then enforce his rights which were forfeited*.

It is not necessary for N. or his grantees to give notice of an intention to enforce the forfeiture. Even if notice were required, N.'s conveyance after expiration of the time limited was a sufficient declaration of such intention. *Allegheny Oil Co. v. Bradford Oil Co.*, 86 N. Y. 638, followed.

Eaton v. Wilcox, 42 Hun, 61 (1886). In May, 1881, defendant E. leased to plaintiff W. a piece of land, "with the right to take, bore, and mine for and gather all oil or gases found in and upon the premises," "for twelve years . . . or as long as oil is found in paying quantities," the lessor to have one-eighth of the product. The lessee covenanted "to commence operations for said mining purposes, and prosecute the same on some portion of the land within two years from this date, or thereafter pay to the party of the first part (E.) \$—— per ——, until work is commenced.

"This lease shall be null and void and at an end unless said second party shall within six months commence and prosecute with due diligence, unavoidable accidents excepted, the sinking and boring of one well . . . to a depth of 1,200 feet, unless oil in paying quantities is sooner found. . . . If the party of the second part fails to keep and perform the covenants and agreements by him to be kept and performed, then this lease shall be null and void, and surrendered to the party of the first part." Within six months from the date of the lease W. drilled a well of the required depth, natural gas being found at the depth of 1,045 feet in large quantities, and oil, but not in paying quantities, at 1,093 feet. W. used the gas for fuel in driving the well, but in no other manner. In 1882 W. removed his engines, leaving his casing in the well, and ceased to carry on mining operations. In 1884 E. leased the premises to T., who assigned to A. G. Co., who entered into possession, and collected and sold the gas.

In an action by W. to restrain interference with or appropriation of the gas: *Held*, that W.'s action did not give E. the right to forfeit the lease to W. There was no covenant requiring the lessee to continue boring oil wells until he found oil in paying quantities. The covenant to commence and prosecute mining operations within two years, etc., was void *for uncertainty* by reason of the unfilled blanks. A contrary decision could not be sustained, because the contract was hard and unconscionable by reason of making no provision to give the lessor a part of the gas.

Conrad v. Morehead, 89, 31 (1893). A lease for North Carolina. ninety-nine years contained a covenant by the lessor that the lessee might enter upon the land and dig for gold, silver, and other metals and minerals, might use timber and erect machinery, and at any time when he thought proper might surrender the lease; and the lessee covenanted to pay to the lessor one-tenth of the metal so obtained. *Held*, there was an implied covenant by the lessee to work the mine with reasonable diligence, and a failure to work it, worked a forfeiture.

"The right of the landlord to enter for the forfeiture of a term by the tenant arises either by implication of law, without any stipulation

upon the subject between the contracting parties, or where it is a matter of express stipulation in the deed or contract."¹

Maxwell v. Todd, 112, 677 (1898). Plaintiffs claimed under a lease, dated Oct. 19, 1879, of the tract in question "for the purpose of boring, mining, and operating for gold, silver, and such other minerals as may exist therein, or be found for the period and term of ninety-nine years," the lessee to have exclusive rights to mine and also rights of way, etc., and the right to sublet, the consideration being one dollar and one-tenth of the net proceeds. Defendants claimed that the lease had been forfeited for failure to work the mines diligently. Burwell, J.: "There is in it no stipulation that a failure to open and work the mines shall cause a forfeiture. But the construction put upon the contract by the law is the same as if such a stipulation had been expressly written therein." *Conrad v. Morehead*, 89 N. C. 81, quoted. The trial judge "told the jury that a failure on the part of the lessees to work the mine for five years would cause a forfeiture of which the lessors might take advantage, if they saw fit to do so. Certainly the plaintiffs have no right to complain that the period fixed by his Honor (five years) was too short. No re-entry by lessors was practicable or necessary. They were in possession of the land at the date of the lease, and thereafter continued in possession; that possession being subject to the mining rights of the plaintiffs until those rights were lost to them by non-user and abandonment according to the terms of the contract as construed by the law."

Hawkins v. Pepper, 117, 407 (1895). H. by instrument in writing sold to P. in consideration of one dollar "all our right, title, interest, and claim in and to all the iron, copper, and lead ores, and also all other minerals that may be found in" certain land, with the usual mining rights, and gave P. full power to convey to other parties. In consideration thereof P. agreed to make examination of the land, and if any valuable minerals were found, to pay H. half the net amount received for them, or in case of conveyance to pay H. \$200 and in addition half the net receipts.

P.'s failure to work the mine for eight years worked a forfeiture of the lease. Where the performance of an act is the only consideration of the contract, it should ordinarily be construed as a condition.

The grant of the power to convey "is utterly irreconcilable with any other mutual understanding but that the title was conveyed to the defendant in order that, after working it and paying over the royalty agreed upon, P. should be empowered to sell the developed mine upon paying \$200," etc.

"We conclude that there was manifestly no intent to vest in the defendant P. an absolute and indefeasible estate for the nominal consideration, but that it was the mutual understanding that the fee should pass to him for the temporary purpose of selling within a reasonable time, and that meantime there was an implied condition attached that it should be fitted for active operations by P. or for examination with a view to purchase."

Re-entry was not necessary to complete the forfeiture.

¹ The failure to work in this case was for more than twenty years. See comment on p. 148.

Pennsylvania. *Tiley v. Moyers*, 25, 397 (1855). A lease of a coal bank providing that if the lessee suffer the bank to be idle for a year it shall be taken as an abandonment, a forfeiture is not worked by the abandonment of the opening on the leased land, the lessee continuing to take out coal through an opening from an adjoining tract owned by him. The principal thing granted in the lease of a coal bank is the right to take coal out of it, and not the passage to the coal; and an abandonment under the above provision does not take place so long as coal is taken out through an entry.

Moyers v. Tiley, 32, 267 (1858). In a lease of a coal bank which provides that the lessee shall put the said coal bank in good working order for the rent of the first year, and thereafter pay a certain sum for every bushel of coal taken out, and that, if the said coal bank should stand idle by the act of the lessee when it would yield coal for the term of one year, it should be taken as an abandonment of the lease, and treated accordingly; the clause of forfeiture does not apply to the first year.

Davis v. Moss, 38, 346 (1861). Where a lease provided that if the lessee should cease mining operations for twelve consecutive months, it would become void, the entry of the lessee from time to time to clean and grease an engine which he had erected on the premises and used in mining was not a continuance of mining operations, and would not prevent a forfeiture.

McKnight v. Kreutz, 51, 232 (1866). A provision in a coal lease that the lessees shall carry on their operations so as not to injure the surface, and not to spoil the coal, and that "in order to carry this condition into effect" the lessors reserved the power to send from time to time an expert into the mine to examine the manner of business, and get his approval thereof, is not a condition, but a covenant, and its breach does not work a forfeiture.

The lessee agreed to mine at least seventy-two thousand bushels, to pay a fixed sum for each one hundred bushels, and to make monthly returns, with a provision that, in case of neglect to comply with the covenant for the payment of rent, the lessor might determine the lease. The lessee having failed to comply with these provisions, and the lessor having taken possession, the latter was presumed to have done so in exercise of his right to terminate the lease; and it was error to submit the question of waiver of this right to the jury.

"Conditions that work forfeitures are not favorites of the law, and nothing less than a clear expression of intention that a provision shall be such will make it a condition upon which the continuance of an estate granted depends. Here there is no such intention apparent. True, in providing a mode by which the stipulation might be enforced the parties speak of it as a condition, but it is evident they used the word in a sense in which it is often used, that of understanding, agreement, or covenant. That it was not intended to be a cause of divestiture of the estate of the lessee, is plain from the fact that there is no declaration that doing injury to the surface or spoiling the coal should work a forfeiture; while in regard to breaches of other covenants there is such a declaration. Having expressed for what causes a forfeiture might be claimed, it is not to be inferred that there are any grounds of forfeiture not declared to be such."

Kreutz v. McKnight, 53, 319 (1866). By a lease of coal under land, the lessee agreed to take out 72,000 bushels per annum, for which he was to pay the lessor seventy-five cents per bushel at the end of each month. He was ousted at the end of five months. He then brought ejectment, and showed 6,064 bushels mined, and payments amounting to \$43.

Held, he could not recover, having shown neither performance nor offer of performance. Had there been a *substantial performance* or a *bona fide attempt at performance*, the putting another tenant on the premises without demand or notice to lessee would not have been a proper method of enforcing a forfeiture.

Chicago & All. Oil & Mining Co. v. U. S. Petroleum Co., 57, 83 (1868). Pending an action at law for the forfeiture of an oil lease, where the alleged breaches of covenant are doubtful, and a master in equity had found that there was no wilful or substantial breach, a court of chancery will not appoint a receiver of the lessee's oil.

Semble, that a breach of covenant to deliver lessor's share of the oil in barrels, where the flow of oil was so unexpectedly great as to make such a delivery impracticable, will not work a forfeiture under a clause providing "that a failure of the said party of the second part to comply with any one of the reservations, conditions, or agreements contained in the within instrument, which by its terms are to be done, observed, kept, and performed by the said party of the second part, shall work a forfeiture of the rights hereby granted."

Rynd v. Rynd Farm Oil Co., 63, 397 (1869). R. granted to W. the exclusive right to bore for oil on his farm, R. to have one-fourth of the product, and in case, after reasonable experiment, W. should be satisfied that oil could not be found in profitable quantities, the lease to determine, and possession to revert to W.; should oil be found in profitable quantities, the lease to be perpetual, W. not to interfere with R.'s farming. On part of the land boring had been profitable; on the rest, operations had been abandoned. R. alleging that they had not been successful, brought ejectment for the latter part. The jury having found that the work of obtaining oil was prosecuted with reasonable diligence, and oil found in profitable quantities, there was no forfeiture.

Karns v. Tanner, 66, 297 (1870). By the terms of an oil lease the lessee was "bound, under the penalty of forfeiture of the rights and privileges hereby granted, to commence operations by boring or mining within one year from date hereof, and prosecute the same with reasonable diligence."

The lessor having entered for condition broken, and leased to other parties, the lessee brought ejectment. The court charged as follows: "But although the mere lapse of time was, in my opinion, not sufficient to warrant a declaration of forfeiture or seizure of the premises, still, if aided and strengthened by the acts and declarations of the tenant evincing the intention permanently to abandon, or to do so for any unreasonable time, it would justify the entry and forfeiture in proportion to the established facts and circumstances of abandonment. Of this the jury are the judges. There is, therefore, but one question for the jury: Were there such acts and circumstances, or such unreasonable

delay, manifesting an abandonment as justified the entry by Parker and declaration of forfeiture." This was held not to be error.

"Abandonment of the lease was a question of intention, and was to be determined only on the investigation of facts."

Brown v. Vandergrift, 80, 142 (1875). Agnew, C. J.: "The discovery of petroleum led to new forms of leasing land. Its fugitive and wandering existence within the limits of a particular tract was uncertain, and assumed certainty only by actual development founded upon experiment. The surface required was often small compared with the results when attended with success; while these results led to a great speculation by means of leases covering the lands of a neighborhood like a flight of locusts. Hence it was found necessary to guard the rights of the land-owner, as well as public interest, by numerous covenants, some of the most stringent kind, to prevent their lands from being burdened by unexecuted and profitless leases incompatible with the right of alienation and the use of the land. Without these guards, lands would be thatched over with oil leases by subletting, and a farm riddled with holes and bristled with derricks, or operations would be delayed so long as the speculator would find it hopeful or convenient to himself alone. Hence covenants become necessary to regulate the boring of wells, their number, and time of succession, the period of commencement and of completion, and many other matters requiring special regulation. Prominent among these was the clause of forfeiture to compel performance, and put an end to the lease in case of injurious delay or a want of success. These leases were not valuable except by means of development, unlike the ordinary terms for the cultivation of the soil or for the removal of fixed minerals. A forfeiture for non-development or delay therefore cut off no valuable rights of property, while it was essential for the protection of private and public interest in relation to the use and the alienation of property. In the present case the lease was modified by adding immediately after the clause of forfeiture a stipulation that, should the lessee not commence operation at a time specified, he should pay to the landlord thirty dollars for each and every month until such time as drilling should be commenced. The lessee, having paid for three months' delay, suffered eleven months to elapse without payment or tender, and then tendered the whole sum, which the landlord declined to accept, and insisted on the forfeiture, he in meantime having made a new lease to a party who went into possession. The learned judge below held that the lease was forfeited by the omission to pay the monthly sums, the lessee having done nothing in performance of his covenants. We cannot pronounce this to be an error, in view of the nature of the lease, the true intention of the clause of forfeiture, and the want of any valuable interest acquired by the lessee, by performance. That time may be made of the essence of the contract by the express agreement of the parties has been so often decided that no citation of authority is necessary. In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity, and protects the land-owner against

the indifference and laches of the lessee, and prevents a great mischief, as in the case of such lessees. To perpetuate an oil lease forever by the payment of a monthly sum, as here, at the will or caprice of the lessee, would work great injustice. The covenant of forfeiture was not abrogated entirely, but only modified."

Munroe v. Armstrong, 96, 807 (1880). A lease of a piece of land for oil purposes for twenty years, or until forfeiture, lessees to prosecute work with due diligence until success or abandonment, and lease to be forfeited if oil is not found in paying quantities, or if lessees cease to work for thirty days at any time.

Held, lessees might sink as many wells as they pleased so long as they worked with due diligence, but that a cessation of work for thirty days worked a forfeiture, and lessor might lease to another. "In the rapid development and exhaustion of oil lands, cessation of work for nine months is a long period. Often, in far less time; the fluctuation in prices of lands and leaseholds is very great. Perhaps in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other."

Truby v. Palmer, 4 Cent. Rep. 925 (1886). In a lease which declares that the land shall be occupied and worked for petroleum, and for no other purposes, and that if oil be not found in paying quantities within four years, the lease shall be null and void; the production of gas will not satisfy the conditions of the lease and prevent a forfeiture.

Cryan v. Riddelsperger, 7 C. C. R. 473 (1887). An oil lease provided that one well should be completed within three months, a second in a year, and a third within two years; each well to hold one-third of the lease; and failure to complete a well to forfeit the lease *pro tanto*. The first two were completed according to contract; the third was not, the reason being that lessee, though he diligently endeavored to secure workmen, was unable to do so on account of extreme cold weather. This was not a legal excuse for not completing the well, and a forfeiture was worked. A virtual agreement by lessor that lessee might complete the well when the weather would permit, and work done on the faith of lessor's action, is not enough to work an estoppel.

Galey v. Kellerman, 123, 491 (1889). A lease of land for the purpose of boring for oil and gas provided that operations should be commenced within sixty days, and one well completed within three months therefrom, in default of which the lessees were to pay \$100 per annum within three months after the time for completing such well; "and failure to complete one well, or to make any of such payments within such time, and at such place as above mentioned, renders this lease null and void, and to remain without effect between the parties." Lessees having failed to complete well or make payment, lessor brought an action of covenant for the penalty. *Held*, he could recover, and defendant could not set up forfeiture of lease as a defence. The lessees' acts had worked a forfeiture of their rights, but not those of the lessor.

Hoch v. Bass, 126, 13 (1889). Lease of land for mining of clay and ochre, by which lessee agreed to pay twenty-five cents per ton, in

quarterly payments, for ochre mined, and to mine not less than five hundred tons, and pay for the same at the end of each year, "in default of which the above lease is to be null and void." "It is further agreed, that if any of the covenants above mentioned should not be complied with for the term of three months, then the above lease is to be null and void." These clauses must be construed together. Lessee having failed to mine five hundred tons by the end of the year or to pay royalty on that amount, a forfeiture did not arise until three months after the end of the year, and it was prevented by payment of royalty within that time.

Duffield v. Hue, 129; 94 (1889). The right of the lessor in an oil lease to insist upon a forfeiture of the lease by reason of a failure of the lessees to put down a seventh well in a stipulated time, is waived by his acquiescence in the failure to put down two or three of the preceding six wells within the period stipulated in the lease. "The lessees might well believe, from such acquiescence, that strict performance of the terms of the lease as to the time of putting down the wells would not be insisted on, and that a reasonable notice should be given before a forfeiture could be claimed on account of failure to sink the seventh well."

Wills v. Manfrs. Nat. Gas Co., 130, 222 (1889). Lease for twenty years of premises for the purpose of excavating gas and oil, by which the lessee covenanted to complete a well by a fixed date, and upon failure to do so to pay the lessor \$1,000 per year, in quarterly payments, until he had done so, with a provision that on failure to perform the covenants of the lease the privilege and easements thereby given should cease and become void. This provision was inserted for the protection of the lessor, and he had under it an undoubted right by reason of the lessee's failure to complete a well, or to make the quarterly payments provided for; but the lessee had no right to declare such a forfeiture, and could not set it up as a defence if the lessor, affirming the continuance of the lease, brought suit for the unpaid quarterly payments.

Clark, J.: "A distinction formerly prevailed between a proviso declaring that the lease should be void on a specified event, and a proviso enabling the lessor to determine it by re-entry. It was held that in the former case the lease became absolutely void on the event named, and was incapable of being restored by acceptance of rent or other act of intended confirmation; whilst in the latter some act, such as entry or claim, must have been performed by the lessor to manifest his intention to end the demise, which was voidable in the interval and consequently confirmable. The force of this distinction, it is said, in *Taylor on L. & T.*, § 492, has been almost, if not quite, abated by the modern decisions, which establish that the effect of a condition making a lease void upon a certain event, is to make it void at the option of the lessor only, in cases where the condition is intended for his benefit, and he actually avails himself of his privilege. To the same effect is 2 *Platt on Leases*, 327. But it is entirely optional with the lessor whether he will avail himself of his right or not, although by the terms of the proviso the term is to cease or become void for the non-performance of the covenant; and if the lessor does

not avail himself of it the term will continue, for the lessee cannot elect that it shall cease or be void. Taylor on L. & T., *supra*. Where there is a proviso in a lease that on non-payment of rent the term shall cease, the lessor and not the lessee has the option of determining the lease upon a breach made. *Reid v. Parsons*, 2 Chit. 247.

"The English law in this respect had been generally followed in this country, and such a lease is held to be good until avoided; though the lessee is estopped to set it up against the lessor. A lessee cannot avail himself of his own act to vacate a lease, on the principle that no man shall be permitted to take advantage of his own wrong. Wood's L. & T. 1204. So Mr. Parsons in his Law of Contracts, Vol. I., p. 507, referring to the distinction formerly recognized between the effect of a proviso declaring that the lease shall be void in a specified event, and a proviso enabling the lessor to determine it by re-entry, says: 'This distinction is now exploded, and it is held that the lease is voidable only at the election of the lessor, but not of the lessee, though the proviso expressly declare that it shall be void.' To the same effect are the cases of *Clark v. Jones*, 1 Den. 516, and *Phelps v. Chesson*, 12 Ired. 194, and many others that might be referred to.

"In Pennsylvania the older doctrine would seem at first to have been adhered to, that in a lease for years with condition, if the condition be broken by the lessee, his interest was *ipso facto* void by the breach, and no subsequent recognition of the tenancy could set it up. *Kenrick v. Smick*, 7 W. & S. 41. In the case cited there was a lease of land upon condition that the rent should be paid upon certain specified dates, and if a certain default was made for three months, neglect to pay after ten days' notice should render the lease null and void. The default occurred and notice was given, and it was held that after ten days the lease was *ipso facto* void, without re-entry, and could not afterwards be affirmed or continued. In *Sheaffer v. Sheaffer*, 37 Pa. 525, the doctrine announced by Justice Sergeant in *Kenrick v. Smick*, *supra*, was adhered to; the English cases were brought into contrast with the doctrine of *Kenrick v. Smick*, and it is admitted that the rule of the English courts is followed in most of the States of the Union. In *Davis v. Moss*, 38 Pa. 346, the rule of the previous cases is again apparently recognized, but its rigor is relaxed in this, that the forfeiture is said to depend upon the terms of the instrument, 'unless there be evidence to affect the landlord with a waiver of the breach, like the receipt of rent or other equally unequivocal act.'

"The distinction between the Pennsylvania cases referred to and the weight of authority elsewhere, therefore, would seem to be that by the former the lease, upon breach of the condition, is *ipso facto* void, unless by some unequivocal act of the lessor it is waived, whilst by the latter it is void if the lessor elects by some positive act to take advantage of it. We do not understand that in either case a re-entry is required to complete the forfeiture. This almost amounts to a distinction without a difference. In practice, the *prima facies* being different, it merely shifts the burden of proof from one party to the other.

"It will be observed, moreover, that the Pennsylvania cases already referred to are all cases in which the forfeiture was set up by the lessor

upon the default of the lessee; in none of them did the lessee set up his own default as a cause of forfeiture. No case has been called to our attention, in this or any other State, in England or elsewhere, which recognizes the doctrine that a party may take advantage of his own wrong, or set up his own default to work a forfeiture of his own contract. Persons may, of course, contract in this form and to this effect if they choose, but we do not understand the parties to this contract to have so intended. But the rigid rule of *Kenrick v. Smick*, *supra*, is further relaxed in the very recent case of *Galey v. Kellerman*, 123 Pa. 491."

"Thus it appears that the distinction formerly maintained between the rulings of the English courts and of the courts of our sister States, and the rulings in Pennsylvania, is no longer found to exist. We have by slow approaches at last apparently turned into the general current of cases, in which is found, without doubt, the great weight of authority, both in England and in this country."

Hoch v. Bass, 133, 328 (1890). Lease of ochre mine (same lease as in s. c. 126, 13, *supra*), by which lessee covenanted to mine a certain quantity, and pay a certain royalty on a minimum quantity, and that "if any of the covenants above mentioned should not be complied with for the term of three months, then the above lease to be null and void."

The lessee being in possession after failure to pay royalty, lessor could not maintain a bill in equity for injunction to enforce a forfeiture. There was an adequate remedy at law by assumpsit for arrears or ejectment for the land.

Palmer v. Truby, 136, 556 (1890). The lessee of land demised for the production of petroleum alone, who obtains gas but not oil, and is thereupon dispossessed by ejectment brought upon an alleged forfeiture, has no equity to be reimbursed the expenses of his operations out of the proceeds of the gas obtained. The terms of the lease did not contemplate or provide for the production of gas.

Thompson v. Christie, 138, 230 (1890). Upon a covenant in an oil lease, that the lessee shall drill a well within a specified time, and on failure so to do shall pay the lessor \$40 per annum until such well is commenced, the lessor cannot recover in ejectment for failure to drill the well, the lease containing no clause providing for a forfeiture of the lessee's rights upon such failure. The rule prevailing in equity is, that to enable the lessor to declare and enforce a forfeiture, *the right so to do must be distinctly reserved; the proof of the happening of the event upon which it is to be exercised must be clear, the right must be exercised promptly, and the result of enforcing the forfeiture must not be unconscionable.*

The plaintiff submitted evidence of a parol agreement contemporaneous with the defendant's lease, and on the faith of which it was signed, that the annual payments should commence one year earlier than stipulated for, and that upon failure to make the first of such payments the lease should be forfeited; but this was denied by the lessee.

For several months before the suit was brought the defendant had been in actual possession engaged in drilling a well, and there had been no attempt to exercise a right of forfeiture except by the device

of executing the new lease to the plaintiff, and the defendants proposed to show offers of payment refused by the lessor.

Upon the facts of the case as they were shown (and as the defendants offered to show them), the plaintiff would not be entitled to have the lease, under which the defendant held, reformed, to enable him to assert a forfeiture in this action, as in equity the conscience of a chancellor would not be moved to aid him therein. Though a parol engagement for a forfeiture of the prior lease, for failure to commence the well or pay the rental, was entered into, yet an assignee of the lease for a valuable consideration and without notice of the agreement would obtain and could convey a good title even to a vendee who had actual notice.

Kennedy v. Crawford, 138, 561 (1890). K. made an oil and gas lease not to exceed fifteen years to C., reserving royalty in kind upon the oil and of ten per cent of the net proceeds of the gas. C. agreed "to commence drilling on said tract within ninety days from June 27, 1885, and to prosecute said drilling with due diligence to success or abandonment, and should oil or gas not be pumped or excavated in paying quantities on or before June 27, 1886, then this lease to be null and void." There was a further provision for forfeiture, for failure to comply with any of the terms or conditions of the lease.

This lease required that within the year a product should be obtained capable of division between the parties in the proportions mentioned in the lease. Unless this was done the drilling was not prosecuted to success, provided lessee was not prevented by lessor.

Even if oil or gas was found in paying quantities, lessee was not at liberty to leave work from December to April. To do so would not be prosecuting the drilling with due diligence. The lease was not complied with by simply excavating oil or gas in paying quantities at any time before June 27, 1886. He was subject to an obligation of due diligence all the time. The question of what constitutes diligence is for the jury.

Ray v. West Pa. N. Gas Co., 138, 576 (1890). Lease of a tract for the purpose of operating for oil and gas, lessor to receive one-tenth of the oil produced and \$500 per annum for each well drilled in case gas was conducted and used off the premises. The lease contained this clause: "The party of the second part agrees to pay, within ten days from execution of this lease, the sum of \$53; and if a well is not completed within six months from the execution of this lease, the said second party agrees to pay a further sum of \$53; and so on, continually every six months during the continuance of the term herein specified.

"The said sum of \$500 gas rent shall be paid within one month from the time said well is completed on said premises, and to be paid annually in advance thereafter. It is further agreed by said second party that if a well is not completed within fifteen months from the date of this lease, they are to pay a further sum of \$250, said sum to be a credit on well when drilled; and in case of failure to complete one well within such time, the party of the second part hereby agrees to pay thereafter to the party of the first part, for any future delay, the sum of \$106 per annum, within one month after the time for completing such

well, as above specified, payable semi-annually at the First National Bank of Washington, Pa.; and the party of the first part hereby agrees to accept such sum as full consideration and payment for such yearly delay, until one well shall be completed. And a failure to complete one well, or to make any such payment within such time and such place, as above mentioned, shall render this lease null and void, and to remain without effect between the two parties."

The plaintiff's statement averred that the defendant had not completed a well on the demised premises, and claimed to receive \$53 due Jan. 7, 1889; \$53 due July 7, 1889; \$250 due Oct. 7, 1889; and \$53 due Jan. 7, 1890. Defence was that lessor had never been in possession, and that failure to put down a well avoided the lease without *re-entry*, and there was consequently no liability to pay.

Held, lessee could not set up a forfeiture. The fact that lessor was in possession is of no significance.

Fennell v. Guffey, 139, 341 (1890). An oil lease provided that lessor should complete one well within six months, and upon failure to do so should pay the lessor "for such, the sum of \$231 per annum, within three months after the time for completing the well," with a provision that a failure to complete the well or make the payment within such time should avoid the lease.

The lessee having failed to complete the well, or pay the stipulated sum, he could not set up a forfeiture as a defence to an action for the rental. *Wills v. Nat. Gas Co.*, 138 Pa. 222.

Springer v. Citizens' N. G. Co., 145, 430 (1891). By a lease of land for the purpose of producing oil and gas the lessee agreed to pay a certain sum upon the execution of the lease, a royalty on the oil produced, and if gas were produced in paying quantities, a certain annual rental on each well. The lease also contained a covenant that the lessee should complete a well within six months, and in case of failure to do so to pay a certain sum semi-annually until completion, "and the parties of the first part hereby agree to accept such sums as full consideration and payment for such semi-yearly delay until one well shall be completed; and a failure to complete one well or to make any of such payments in this lease mentioned, within such time and at such place as above mentioned, renders this lease null and void, and to remain without effect between the parties hereto."

In an action for these sums, it was held that the lessee could not set up a forfeiture. The forfeiture clause was inserted in the interest of the lessor, who had the option upon default to assert the forfeiture or affirm the continuance of the contract.

Ogden v. Hatry, 145, 640 (1892). A covenant in an oil lease provided that a failure of the lessee to perform "by either completing a well within the term aforesaid, or paying said rental, shall render this lease and agreement null and void, . . . and all rights . . . of any and all parties hereunder shall thereupon . . . be extinguished, . . . as if this agreement had never been made."

An action for rental was within the rule of *Wills v. N. Gas Co.*, 130 Pa. 222; *Ray v. N. Gas Co.*, 138 Pa. 576, that such a covenant was for the benefit of the lessor, and the lessee by his own act and default could not relieve himself from a liability already incurred. The

clauses after the words "null and void" added more verbiage, but no more force.

Jones v. West Penn. N. G. Co., 146, 204 (1892). A lessee in an oil and gas lease covenanted to complete a well by a certain date, or in default thereof pay for further delay a certain yearly rental from the time specified. "And a failure to complete such well or to pay said rental shall render this lease null and void, and can only be renewed by mutual consent."

The legal effect of the covenant is that the forfeiture is for the benefit of the lessor and is at his option, and such effect can be changed only by an express stipulation that the lease shall be voidable at the option of either party or of the lessee.

An offer by defendant to prove "the uniform construction placed upon such leases by both lessors and lessees" to be that they were forfeitable at the option of either party, was inadmissible. It is no more than an offer to show a popular misunderstanding of the law.

Phillips v. Vandergrift, 146, 857 (1892). The lessee in an oil lease covenanted to complete a well in a time certain, or in default to pay the lessor for further delay a certain yearly rental thereafter; "and a failure to complete such well or pay said rental shall render this lease null and void, and not to be revived without the consent of both parties hereto."

An action for rental was within the rule of *Wills v. N. Gas Co.*, 130 Pa. 222, and *Ray v. N. Gas Co.*, 138 Pa. 576, that such covenant was for the benefit of the lessor, and the lessee by his own act and default could not relieve himself from a liability already incurred.

Leatherman v. Oliver, 151, 646 (1892). An oil lease provided that the lessee should complete a well on the leased premises within six months, "or in default thereof pay to the party of the first part for further delay an annual rental of five hundred dollars, payable quarterly in advance." It was further provided that "a failure to complete said well, or pay said rental for ten days after the time above specified for so doing, shall render this agreement null and void, and it can only be renewed by mutual consent; and no right of action shall after such failure accrue to either party on account of the breach of any promise or agreement herein contained."

Held, that upon failure to drill the well within six months the lessor was entitled to the stipulated rental, and that the latter clause did not deprive him of his right of action. By the latter clause the parties meant that the lessor could not re-enter and treat the rights of the lessee as forfeited or abandoned on the day the default happened, but that he must give the lessee ten days of grace in which to make payment before he could take advantage of the default to terminate the lease. The lessee, however, could not compel the lessor to re-enter so as to terminate the lease for his (the lessee's) benefit.

Heintz v. Shortt, 149, 286 (1892). An oil lease provided that the lessee should complete the first well within six months, "or thereafter within sixty days remove all machinery and buildings for the business erected and used, and this lease be declared null and void unless further prosecuted after the first well drilled. The first well was completed within the six months and oil obtained; but thereafter for

some four years nothing was done towards the drilling of any other well. *Held*, that the lease had become void. In view of the nature of oil, four years was an *unreasonable* time.

Glasgow v. Chartiers Oil Co., 152, 48 (1892). An oil lease demised the oil and gas under the grantor's land, with the right to go upon and operate the land for oil and gas purposes. The lease was to continue for five years, and as much longer as oil or gas should be found in paying quantities. The consideration was a bonus of one hundred dollars, and a royalty of one-eighth part of the oil produced. If gas was found, the rental was fixed at three hundred dollars per year for each well. The lease then proceeded as follows: "Provided, however, that this lease shall become null and void, and all rights hereunder shall cease and determine, unless a well shall be completed on the premises within one month from the date hereof, or unless the lessee shall pay at the rate of one hundred dollars monthly in advance for each additional month."

Held, that the lease contained no covenant binding upon the lessee to pay rent or develop the land. The only penalty imposed upon him for failure to operate the land or pay one hundred dollars per month for delay was a forfeiture of his rights under the agreement. "But payment was the means provided by the contract by which the exercise of the right of the lessor to assert a forfeiture could be postponed. If the lessee did not wish to postpone the exercise of such right, he had only to refrain from making the payment. This case is not ruled by *Ray v. The Natural Gas Company*, 138 Pa. 576, and kindred cases."

Drake v. Lacey, 157, 17 (1893). After a delay of twelve years, equity will not decree the forfeiture of a coal lease for non-payment of royalties.

Poterie Gas Co. v. Poterie, 153, 10 (1893). Where a lessor in a mining lease has re-entered in assertion of a claim that the lessee has forfeited his rights and the claim is disputed on every ground, a preliminary injunction will be awarded and continued to restrain the lessor from continued interference with the premises.

Poterie v. Poterie Gas Co., 153, 13 (1893). And under such circumstances a preliminary injunction will not be awarded against the lessee to restrain him from entering upon the premises.¹

Sanders v. Sharp, 153, 555 (1893). A lease for twenty years for the sole purpose of mining for oil, etc., contained provisions that, in consideration of the lease, the lessee agreed "to commence operations within one year from the execution thereof, or thereafter pay to the lessor four hundred dollars per annum until work is commenced," and that "a failure to pay within sixty days after maturity works an immediate forfeiture." *Held*, that the clause of forfeiture was for the protection of the lessor, who could dispense with its provisions and affirm the continuance of the contract. *Wills v. Manufacturers' Natural Gas Co.*, 130 Pa. 222.

Gibson v. Oliver, 158, 277 (1893). Lessee in oil lease agreed to complete one well within one year, and in case of failure to pay \$500 per annum for such delay, "and a failure to complete one well or to make any of such payments . . . renders this lease null and void,"

¹ See *Poterie Gas Co. v. Poterie*, 179 Pa. 68 (1897).

and to remain without effect between the parties hereto." He further agreed to complete a second well within two years, and in case of failure to pay \$1,000 "or forfeit this lease." In assumpsit to recover the penalty for failure to complete the wells, defendant cannot set up the forfeiture of the lease.

Cleminger v. Baden Gas Co., 159, 16 (1893). Where an oil lease contains a covenant on the part of the lessee "to commence operations on the aforementioned premises, or forfeit this lease within sixty days, and to complete a well on this lease in five months," the lessor may forfeit the lease after the expiration of five months if a well has not been completed within that time.

"The gist of the covenant was to have a well finished in five months. The beginning in sixty days was only material as a step towards that end, and the stipulation for a forfeiture applies equally to both branches of the covenant."

There was a delay in starting operations within sixty days. The lessee desiring to assign the lease, had a conversation with the lessor as to the delay. The result of this conversation he stated to be as follows: "The conclusion was that Mr. Phillips (the lessor) acquiesced in the delay and acknowledged the lease on the assurance that there would be a well put down." *Held*, that there was no waiver of the right to have a well completed within five months.

McMillan v. Philadelphia Co., 159, 142 (1893).¹ The lessee in an oil lease agreed to complete a well within three months, and in case of failure to do so to pay as rental \$25 a month, until the completion of one well, "and a failure to complete such well or comply with any of the foregoing conditions, or to make any of such payments within such time and at such place as above mentioned, renders this lease absolutely null and void, and no longer binding on either party, and will revert the estate herein granted in the lessor, and release the lessee from all his covenants herein contained, he having the option to drill said well or not, or pay said rental or not as he may elect." This clause was for the benefit of the lessor, who might assert the forfeiture or forbear to do so. The lessee not having drilled a well, could not set up a forfeiture as a defence to an action for rent.

Cochran v. Pew, 159, 184 (1893). Lessee in oil lease covenanted to begin work within a certain time or to pay a rental until work is commenced. "The failure of the second party to make any one of the payments when due, or within ten days thereafter, will render this lease null and void, and not binding on either party." This does not make the lease void except at the option of the lessor.

Wolf v. Guffey, 161, 276 (1894). A lessee in an oil and gas lease agreed to complete one well within six months, or pay to the lessor a certain sum within three months thereafter as compensation for delay; "a failure to complete one well, or to make any such payments within such time, and at such place as above mentioned, renders this lease null and void, and to remain without effect between the parties." Lessee having made such failure, lessor, within six days thereafter,

¹ See also, on the point that a forfeiture (1897); *Bartley v. Phillips*, 179 Pa. 175 clause is for the benefit of the lessor, (1897). *Mathews v. People's N. G. Co.*, 179 Pa. 165

without making demand for payment, leased the premises to another person for a long term of years. This was an election by him to enforce a forfeiture and avoided the lease.

Lynch v. Versailles F. Gas Co., 165, 518 (1895). Where time is not stipulated as essential, and a forfeiture for non-payment of money, or other matter that admits of accurate and full compensation, is provided as a mere penalty, whose object is to enforce performance of another and principal obligation, equity will relieve against it, and will not permit it to be used for a different and inequitable purpose.

An oil lease stipulated for rent payable for delay in putting down a well. No time was specified for the payment of this rent, and it accordingly fell due by operation of law at the close of each year. The lessee paid the rent for several years without drilling a well.

He then began operations, and at large expense succeeded in obtaining oil in paying quantities. When the rent fell due the lessee, by an oversight, failed to pay it. Six days afterwards the lessor notified the contractor to take away the machinery, and on the following day declared his election to forfeit the lease. The lessee expended a considerable sum of money between the time when the rent was due and the time of the attempted forfeiture. *Held*, lessor's action had been neither prompt nor conscionable, and the forfeiture could not be enforced.

Steiner v. Marks, 172, 400 (1896). The lessor in an oil and gas lease will not be permitted to enforce a forfeiture for a delay of one day in the payment of rental, where by his acts and declarations he has misled the lessee into the belief that a forfeiture would not be enforced for such a delay.

Petroleum Co. v. Coal, Coke, & Mfg. Co., 89, 381, Tennessee. (1890). The defendant's grantor "leased" to plaintiff "for the term of ninety-nine years all of his mineral and petroleum interests, for the purpose of exploring for coal, petroleum, lead, etc., for mining, working, smelting, and rendering the same."

By the lease, the lessees bound themselves to pay "one-tenth part of the net profits of whatever may be discovered and worked in and upon said lands deemed advisable to be tested and worked by" the lessees, and they agreed "to commence testing said property within three years' time."

Under this the lessees were under no obligation to test or work unless they deemed it advisable; there was therefore no consideration, and the leases were void. They were mere options based on no consideration.

If, however, the contract be construed as binding the lessees to test within three years, that provision is a condition, and failure to comply therewith works a forfeiture of the lease. No other compensation was contemplated than that which would result from the discovery and working of the mines. The testing, therefore, was of the very essence of the contract, not only with respect to time, but also as to the thoroughness and certainty with which the mineral value of the land should be ascertained.

The test required was such as would discover not only the existence of minerals, but their commercial value, considering their abundance and accessibility. It should afford such information as a prudent investor would desire, before expending money in development.¹

¹ See comment on p. 148.

Virginia. *Young v. Ellis*, 91, 297 (1895). A mining lease for ninety-nine years, "provided the lessee paid the rent," which was construed to be not a license, but a grant of a right and privilege, could not be avoided for non-payment of rent, if that payment was hindered by the acts of the lessor.

West Virginia. *Bowyer v. Seymour*, 18, 12 (1878). A provision in a lease of minerals that a failure to pay royalty for sixty days after it is due shall be considered an abandonment of the lease, is to be construed a forfeiture, and the lease will continue unless the lessor exercises his right of re-entry. The words "shall be considered an abandonment" are equivalent to "shall be considered forfeited," or "shall be considered void."

Guffey v. Hukill, 34, 49 (1890). W., on June 30, 1886, leased to defendant's assignor land for drilling for gas and oil, with a covenant on the part of the lessee to commence operations within nine months, and after that to pay \$1.33 per month until work was commenced; "and a failure on the part of the said second party to comply with either one or the other of the foregoing conditions shall work an absolute forfeiture of this lease." Defendant began to bore in May, 1889. A tender of the monthly payments made in October, 1888, was refused, but payment was accepted in January, 1889, and thereafter. On July 11, 1888, W. leased to assignor of plaintiffs, who brought this action of unlawful detainer.

Defendant's lease was held forfeited, because —

1. There being no clause of re-entry, on failure of condition the lease became void as to lessee.

2. W. being in possession for purposes of tillage, re-entry was unnecessary.

3. He signified his intention of forfeiting the lease by making a lease to plaintiff's assignor.

The receipt of rent from plaintiff could not act as a waiver after the declaration of forfeiture by executing the second lease.

The action for unlawful detainer was a proper means of enforcing this forfeiture.

Plaintiff's lease provided for boring a well within six months, and upon failure then for the payment of fifty cents per acre, payable within six months from the time of completing such well. The plaintiff did not bore a well, but tendered the money, and this saved a forfeiture. See also *Hukill v. Guffey*, 37, 425.

Schaupp v. Hukill, 34, 375 (1890). F., on Nov. 6, 1885, gave to defendant an oil lease, with a clause providing for forfeiture for failure to drill a well or pay commutation. No well was drilled. Defendant paid up to Nov. 6, 1886. In 1888 defendant, by mistake, sent his lease to F., who by writing under seal accepted its return, and agreed that it might be cancelled as of Dec. 6, 1886. Having been subsequently advised that this did not put an end to it, he returned it to defendant on May 20, 1889, as having been given up by mistake, and subsequently accepted rent from him. On May 2, 1889, F. leased for oil and gas purposes to plaintiff, endorsing on the lease, "this lease is to be taken subject to the E. M. Hukill lease." *Held*, the second lease was not an unequivocal declaration of forfeiture of the first. The

endorsement saved to defendant the right to have the mistake, if it existed, corrected.

Thomas v. Hukill, 34, 385 (1890). C. made an oil lease for twenty years to defendant's assignor, by which the lessee covenanted to begin operations within six months, or to pay \$5.50 per month until the work commenced, and it was provided that a failure to comply with either of these conditions should work a forfeiture. Work under this lease was not begun for four years, and in the meantime C. made a second oil and gas lease to plaintiff's assignor.

Oral evidence was admissible to determine whether C. intended to declare a forfeiture. Holt, J.: "In leases of this kind the law seems to be fairly well settled, that when a forfeiture for the benefit of the lessor is contracted for in case of default on the part of the lessee, before the lease can be regarded as at an end the lessor must by word or deed, in some unequivocal way, manifest a purpose to treat the lease as forfeited. Otherwise the lessee would have it in his power to make default for his own benefit, and thus escape the performance of one duty by wilfully failing to perform another. . . . I do not understand *Guffey v. Hukill* to lay down a different doctrine, and read by the light of its own facts it does not profess to treat of leases generally, or to say that even in these cases the lessee in a proper case would be deprived of his remedy for relief from the forfeiture in a court of equity by the lessor executing a new lease to some third party. Therefore it becomes material to ascertain the purpose in that respect manifested by the lessor, when he executed the new lease.

"The execution of the second lease cannot be taken as conclusive evidence of a purpose to declare the first one forfeited when its own terms show that such is not the purpose. But if silent on the subject, as this one is, can it not be shown that the lessor executed and delivered the new lease to the lessee himself on condition that it was to be given back, if the first lessee objected? . . . In this case it is not to add or to take from the language, or to impair its legal effect, but to rebut the inference of a collateral purpose to declare a forfeiture which would otherwise be drawn."

The lease to plaintiff's assignor was for two years, or as long thereafter as gas or oil is found in paying quantities. Held, the production of oil by defendant did not extend plaintiff's lease beyond two years.

Hukill v. Myers, 86, 639 (1892). M. leased to H. for twenty years a tract of land for the purpose of producing oil. The lessee covenanted "to commence operations for said purposes within one year . . . or to thereafter pay to said lessor twelve dollars a month until the work is commenced; and a failure of the lessee to comply with either one or the other of the foregoing conditions shall work an absolute forfeiture of this lease."

H. did not commence operations within the year. He paid the first month's rent on Nov. 16, 1886, before it was due, and M. signed a receipt therefor, in which he said, "I hereby agree to accept my rental hereafter quarterly." M. did not pay the rent quarterly, but on Dec. 25, 1888, H. drew an order on him for all rent that might be due, and M. paid thereon \$288, and received from H. a receipt "in full for rental on oil lease to Dec. 30, 1888." On May 18, 1889,

H. paid \$60, and got a receipt in full to May 30. On July 27, 1889, H. leased the premises to S. *Held*, there was no forfeiture. H. had waived his right to insist upon his forfeiture by his acquiescence in M.'s way of paying rent, and M. was, upon payment of rent due, entitled to be restored to possession.

Wisconsin. Sunday Lake Mining Co. v. Wakefield, 72, 204 (1888). In an action for relief against the forfeiture of a mining lease for non-payment of rent, the answer alleged that the lessees had failed to furnish monthly statements of the ore mined, required by the lease; that they had committed waste; that they were insolvent; and that the property was in danger of being dismembered or destroyed by the creditors and unpaid workmen for the purpose of securing their debts. *Held*, on demurrer, that all these matters were proper to be considered in determining whether relief should be granted. Demurrer dismissed.

Wesling v. Kroll, 78, 636 (1891). A mining lease provided for a forfeiture of the lessees' rights thereunder if they failed to work for three weeks. Work having ceased for more than a year, in an action of trespass by lessees against lessor's agents, who had interfered with their possession, whether the lessor had consented to the cessation of work and waived the forfeiture was a question for the jury, the burden of proof being upon the lessees.

E. *By Abandonment and Surrender.*

At common law, abandonment by the tenant during the term, without the landlord's default, does not affect the tenant's liability for rent. But such abandonment acquiesced in by the landlord amounts to a surrender, and is a restoration of the landlord's occupancy. The abandonment of the lease — that is, the leaving of the premises with the intention not to return, or the relinquishment by the lessee of his rights under the lease without intention to resume them — may therefore be treated by the landlord as a termination of the lease.

Abandonment, being a question of intention, is to be determined by the jury from the facts. When there is an obligation expressed or implied to operate under the lease, the failure to do so either within the prescribed time, if there be a time prescribed, or within a reasonable time, will, if unexcused, amount to an abandonment.

An abandonment differs, on the one hand, from a surrender, in that there is no expressed yielding up of the possession by the lessee; it differs, on the other hand, from a forfeiture, in that it is based on an intentional relinquishment of rights by the lessee and not upon a breach of obligation. This distinction is, however, narrow, being often the same thing looked at from different

directions. And as has been pointed out in the last section, cases of abandonment have been treated as forfeitures.

A distinct class of cases terminable by abandonment are those in which the demise is for such time as minerals are found in paying quantities. These, being words of limitation, fix the duration of the lease, and abandonment is tantamount to failure to find the minerals in paying quantities. If after abandonment the lessor encourages expenditure on the faith of the continuance of the lease, he will be estopped from setting up an abandonment.

There may be a provision in the lease giving the lessee the right to abandon it. In the cases considered above there was no such right in the lessee; his act created the right in the lessor. But here the abandonment is the lessee's right, and its definition is to be determined by the construction of the particular lease in which it occurs. Such an abandonment does not relieve the lessee of any obligations which have accrued prior to its date. If taken advantage of by the lessee, it must be set forth as a defence, and need not be negatived by the plaintiff in an action for rent. If there is in fact an abandonment, the failure to give notice, though provided for in the instrument, does not destroy the effect of the abandonment. And on the other hand a formal surrender by deed, if not accompanied by actual abandonment, will not operate as such.

An independent class of cases is composed of those in which the instrument creates a title which is inchoate and for the purpose of exploration only until the mineral (generally oil) is found. Upon the discovery of the mineral a perfect title is acquired. In the meantime the lease may be abandoned at any time before the search proves successful. Such contracts are treated as leases, and the abandonment works their termination, though it would be more scientific, perhaps, to regard this as the failure of a condition precedent to the vesting of the title.

Licenses, personal privileges to mine, may be terminated at any time by abandonment.

Mining leases may, of course, be terminated by express surrender, but this subject calls for no particular discussion.

Indiana. *McDowell v. Hendrix*, 67, 513 (1879). Where a coal lease provides that if no coal is found, and the lease is abandoned for that reason, payments are not to be made; abandonment is matter of defence, and need not be negatived by plaintiff in an action for rent.

Iowa. *Beatty v. Gregory*, 17, 109 (1864). Whether a license to mine has been abandoned is a question of fact for the jury.

Van Meter v. Chicago & Van Meter C. M. Co., 88, 92 (1893). A coal lease gave the lessee the right to abandon the property in case the coal underlying the same proved unworkable by reason of its being too thin, bad roof, or for any sufficient reason which, in the judgment of the lessee, rendered it unprofitable to work the same. It was further provided that it was not the intention of the lessee to enter upon the surface of any of the lands covered by the lease, but to work the coal through the existing shafts and openings of a coal company then working a lower vein, reserving, however, the right to use any part of the surface "only in case of unforeseen contingencies which may arise, rendering it necessary and profitable to do so." *Held*, that in its determination of the question whether the coal could be profitably worked, as fixing its right of abandonment, the lessee was not required to mine or prospect for coal under said land, except from the shafts and openings of the coal company. The reservation of the surface was a privilege to the lessee and imposed no obligation on him.

Ceasing to operate the mine and removing his machinery and appliances was a sufficient abandonment, without a surrender of the lease or the cancellation of recorded mortgages of the leasehold.

Michigan. *Porter v. Noyes*, 47, 55 (1881). Leases of coal lands for twenty-five years with the privilege of renewal were given in 1858 and 1859, with provision that there should be preliminary testing within one year, and that a rent of ten per cent a ton should be paid on all coal raised, and the same on a certain number of tons per year as a minimum, whether raised or not. Lessees, thinking mines not worth working, never went upon the lands, and in 1871 ceased paying rent. In 1879 lessors leased the lands to others. In the same year lessees assigned their interest, and the assignee brought a bill for an injunction against the later lessees. *Held*, owners had a right to regard the abandonment as final, and to relet the premises, and also that they were entitled to be made party defendants.

New Jersey. *East Jersey Co. v. Wright*, 32 Eq. 248 (1880). Where a mining license is granted for the purpose of having lands explored and their mineral sources developed, and it contains a provision that if the licensee concludes to abandon digging ore he shall notify the licensor; if the licensee, after making an opening in the lands and finding a large deposit of ore, does in fact abandon the enterprise because the ore is comparatively valueless, he will be held to have abandoned the mine, although he gave no formal notice.

New York. *Eaton v. Allegheny G. Co.*, 122, 416 (1890), reversing s. c. 42 Hun, 61. F., by contract under seal, "granted, leased, and demised" to plaintiffs certain premises, "with the exclusive right to dig, bore, and mine for, and gather oil and gases . . . to have and to hold the same for the term of twelve years from this date, or as long as oil is found in paying quantities," lessee to give lessor one-eighth of the oil produced.

This did not create an absolute lease for twelve years: "as long as oil is found in paying quantities" are words of limitation, and fix the duration of the lease. The lessees had the right of possession so long

as they in good faith were engaged in boring wells or testing the oil-producing capacity of the land. But where they had tested the lands to their satisfaction and abandoned the search, and ceased to use the land, their right to occupy it ceased and the contract might be legally terminated by the lessor.

Buhl v. Thompson, 3 Penny, 267 (1882). The grantee of all the coal under a certain tract of land agreed to make search for coal within six months, "and if he found coal of sufficient thickness, quantity, and quality to justify opening and working," to pay \$500, \$1,000 within eighteen months, and \$2,000 a year thereafter, "during the continuance of this indenture; and the failure to make search within the said time, and the failure to make such yearly payments within ten days, made upon second party or his assigns, shall be an abandonment of this grant, and the second party or his assigns shall have a right to abandon said lands and mining, and remove all buildings and fixtures." He also agreed to pay a royalty on coal mined; and further, it was agreed "that the payments of \$500, \$1,000, and \$2,000, as aforesaid, when made, are to apply on the rent of coal first mined thereafter, and such yearly payments cease whenever the second party or his assigns abandon this agreement."

Lessee's assignee mined no coal, but made annual payments regularly for nine years, to July, 1878. He then mined, and finally, in 1881, abandoned the mine. This action was for balance of annual payments due November, 1879.

Held, defendant must pay annual payments to time of abandonment. The fact that the amount already paid exceeded the royalty to which lessor would have been entitled if all the coal in the land had been mined is no defence. "The defendants had the remedy in their own hands by abandoning the mine and removing their fixtures and machinery."

Bestwick v. Coal Co., 129, 592 (1889). A contract, executed by trustees who had the legal ownership of the coal but not of the surface, granted and conveyed all the coal under a tract of land, the grantees covenanting to mine and remove four thousand tons of coal yearly, or pay for the same as though mined. The contract also granted to the party of the second part "right of way through, over, and under said land, to transport coal from adjacent lands." It was provided also that the grantees, etc., "shall have the right to abandon this contract, and yield up said coal mine and privileges at any time they shall determine in their judgment that said coal is in quantity, quality, or condition no longer minable with economy and profit." At a certain date the grantees delivered to the grantors a deed of release and surrender of all the coal conveyed, and all the right, title, etc., of the grantees therein, *but continued afterwards in the use of the way through the coal bed conveyed, to coal operated by them on adjacent lands.*

The grantees were bound for the payment of the annual royalty, so long as they retained possession and use of the right of way, and the fact that all the coal except the ribs had been removed was no defence, the grantors having the right to have all the coal removed, the right of the surface owner not being in question.

Riddle v. Mellon, 147, 80 (1892). Plaintiff made a lease to G. for oil and gas purposes, "for, during, and until the full term of one year

next ensuing . . . and as long as gas or oil is found in paying quantities or rental is paid." The lessee drilled a well within the year and found oil, but failed to produce it in paying quantities. He then assigned the lease to defendant, to whom after the expiration of the year plaintiff made the request that he drill the well deeper. This the defendant proceeded to do, and the plaintiff recognized his rights under the lease as still in force. The defendant failing to find oil in paying quantities in the well, abandoned it. He then proceeded to drill another well, and plaintiff brought trespass against him. Oil in paying quantities was found in this second well. Plaintiff having after the expiration of the year encouraged and allowed defendant to expend money and labor on the premises, on the basis of the continuance of the lease, was estopped from asserting that it was at an end. The only limitation then, upon defendant's right, was that he should proceed with reasonable diligence to operate or continue operations for the discovery and production of oil.

Barnhart v. Lockwood, 152, 82 (1892). Lessees under a lease for eighteen years, dated March 1, 1878, agreed to go upon demised premises and operate the same for oil, and deliver to the lessor one-eighth of the oil obtained, and to commence a test well within forty days. Lessees did not take possession or carry out their agreement. They afterwards sunk a test well near the demised premises which was a failure, and which they abandoned, and nothing was attempted to be done towards the development of the property by the lessees until Dec. 18, 1889, when the property increased in value by reason of the development of others in the neighborhood. *Held*, that the action of the lessees constituted a surrender of the lease; their non-action during a period of nearly twelve years amounted in law to an abandonment of any right they otherwise might have had.

Venture Oil Co. v. Fretts, 152, 451 (1893). G. leased to R. "for the sole and only purpose of mining and excavating for petroleum, or carbon oil, gas, or other valuable mineral or volatile substances," a certain tract of land for twenty years, the consideration of which was the one-eighth of the product. It was further provided: "The party of the second part covenants to commence operations for said mining purposes within six months . . . on some one of the farms leased by said second party in this township, and when oil is found in paying quantities then second party agrees to commence operations within sixty days upon the next adjoining farm leased by second party, and so on until all lands leased in the township are tested to success or abandonment." R. began operations and drilled a well on another farm, but found neither oil nor gas. Concluding the territory to be worthless as oil land, he made no further effort to test it. Six years later G. leased to F. R. was held to have abandoned his lease, and F.'s title prevailed. "A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the Statute of Limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite a different ground. The title is inchoate and for purposes of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned. If oil is found, then the

right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of his contract."

Plummer v. Hillside C. & I. Co., 160, 483 (1894). Williams, J.: "The appellant cites the *Venture Oil Company v. Fretts*, 152 Pa. 451; *McNish v. Stone*, 152 Pa. 457, and other cases in which oil leases were considered and the rights of the lessors and lessees defined. A lease granting to the lessee the right to explore for oil and, in case oil is found in paying quantities on the leased premises, to drill wells and raise the oil, paying an agreed royalty therefor, has been held to convey no interest in the land beyond the right to enter and explore, unless the search for oil proves successful. If it proves unsuccessful and the lessee abandons its future prosecution, his rights under the lease are gone. So it might be with a similar lease of lands supposed to contain coal. If the lessee entered, explored the leased premises, and finding nothing gave up the search, he would no doubt be held to the same rules, upon the same provisions in the lease, as were applied in the cases cited. The difference in the nature of the two minerals, and the manner of their production, has, however, resulted in considerable differences in the forms of the contracts or leases made use of. When oil is discovered in any given region, the development of the region becomes immediately necessary. The fugitive character of oil and gas, and the fact that a single well may drain a considerable territory and bring to the surface oil that, when in place in the sand-rock, was under the lands of adjoining owners, makes it important for each land-owner to test his own land as speedily as possible. Such leases generally require, for this reason, that operations should begin within a fixed number of days or months, and be prosecuted to a successful end or to abandonment. Coal on the other hand is fixed in location. The owner may mine when he pleases regardless of operations around him. Its amount and probable value can be calculated with a fair degree of business certainty. There is no necessity for haste, nor moving *pari passu* with adjoining owners. The consequence is that coal leases are for a certain fixed term, or for all the coal upon the land leased, as the case may be. The rule of *Venture Oil Co. v. Fretts*, *supra*, is not capable of application to the lease made by Callender to Meredith in 1828, for several reasons: (1) The Callender lease is in effect a sale of all the coal in the leased premises, and consequently a severance of the surface therefrom. (2) It is for one hundred years. All idea of haste in development or operating is excluded by the terms of the instrument, and the time for commencing the work of mining is left to the discretion of the lessee. (3) The consideration of the grant was not the development of the mineral value of the land, but the price fixed by the agreement and actually paid to the lessor in money."

Hooks v. Forst, 165, 238 (1895). Where the lessees under an oil and gas lease have an absolute right to rescind the lease at any time, and such lessees never enter into possession of the demised premises, the rights and privileges under the lease may be surrendered by parol.

An oil and gas lease gave the lessor no right to rescind, but provided that the lessees "shall have the right at any time to surrender

up this lease, and be released from all money due and conditions unfulfilled." The lessees did not absolutely covenant to develop the land, but only agreed to bore or pay one hundred dollars per month if they did not. The lessees never entered into possession of the land.

The evidence tended to show that after two monthly payments had been made, two of the three lessees asked the lessor for time on the third monthly payment, and that it was agreed between them that the time should be extended three weeks, and if the money was not then paid, they would surrender the lease. At the end of three weeks the money was not paid, and one of the lessees told the lessor that he should go on and lease to any one, and that the lease would be returned. The lease was never formally redelivered. Sixteen months afterwards the lessor leased the premises to other parties.

Held, that the evidence was sufficient to establish a rescission of the lease. In such a case the tender of the monthly rental after the rescission had been consummated could not revive the lessees' rights or privileges.

Bartley v. Phillips, 165, 325 (1895). Hartzell leased to plaintiff a tract of land for oil purposes for a term of ten years. By the terms of the contract plaintiffs were to commence work within thirty days, and to prosecute it "with due diligence until completion or abandonment." In an action of ejectment to recover possession of the land the question of abandonment should have been submitted to the jury. "Abandonment is a mixed question of acts and intention." "Whether the evidence on the part of the plaintiffs showed abandonment by them did not depend exclusively on the length of time that operations had ceased, but also on the intention, and that again was largely dependent on the agreement and understanding of the parties."

The parties might agree as to what should constitute due diligence and abandonment, and parol evidence was admissible to prove such an agreement or understanding.

No one can take advantage of abandonment but the lessor or the one succeeding to his rights. "As against any but the grantor an abandonment is not complete until the statutory period of limitation or the end of the term granted, and possession may be resumed by the grantee at any time previous."¹

Cowan v. Radford Iron Co., 83, 547 (1887). An agreement by which the owner of land sells to another all the minerals under the land, with the usual mining rights and privileges, which are described to be the right to enter at any time with workmen, machinery, etc., and mine and carry away the coal; to use so much of the surface as is necessary for the operations; to erect the necessary buildings, and construct roads and to use water; and the grantee agrees to pay quarterly, fifteen cents a ton for all iron ore so taken, and is given the privilege of removing his machinery, buildings, fixtures, and improvements at any time, — creates a tenancy at will. The abandonment of the work and the failure to mine and pay rent is a termination of the lease by the lessee, and the lessor is no longer bound thereby.

¹ See also *Bartley v. Phillips*, 179 Pa. 175 (1897).

Hodgson v. Perkins, 84, 706 (1888). An agreement by which the owner of a farm bargained and sold the privilege of digging and working for gold thereon for a share of the product, reserving the right to cultivate and use the land, provided he did not molest or interfere with the lessees in searching and working for gold or other metals, the lessees to have and hold the land *so long as they may deem it worthy of searching and mining for gold or other metals*, creates a personal privilege which is not assignable, and is terminated by abandonment.

Bluestone Coal Co. v. Bell, 38, 297 (1893). Where a West Virginia. lease is executed of all the coal, timber, and mineral privileges on a certain tract for ninety-nine years, the lessee agreeing to pay ten cents a ton for coal mined and shipped, and for all such timber as said lessee may think merchantable, which may be cut, shipped, sawed, or moved from said leased premises, fifty cents per one thousand square feet of one inch thickness, and a proportionate sum for other thicknesses, or twenty-five cents per tree, no time being fixed for the commencement of operations, the lessor has the right to presume that operations will be commenced in a reasonable time. If nothing has been done under this contract for a period of seventeen years, the lessor has the right to presume the contract has been abandoned, and the lessee or his assignee cannot, after having been guilty of such laches, restrain the lessor from cutting and using, or removing the timber.

Where it is apparent that the lease was entered into under a mutual mistake as to the existence of a workable vein of coal in the land, and that the timber contract was induced by the belief that the coal did exist, and to aid the lessee in his mining operations, said contract should be rescinded, not only as to the coal but as to the timber.

CHAPTER V.

PROPERTY OF THE SOVEREIGN AND ITS GRANTEES
IN MINERALS.

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| <ul style="list-style-type: none"> I. In Mines of the Precious Metals. II. In Minerals in the Beds of Navigable Streams. III. In Minerals under Public Highways. IV. In Minerals contained in Lands taken by Right of Eminent Domain. | <ul style="list-style-type: none"> A. Property in the Minerals upon or under the Lands appropriated. B. Mine-owner's Rights, and Restrictions upon him by Reason of the Exercise of the Dominant Right. Damages for the taking. |
|---|---|

THE property of the sovereign in minerals contained in *public land*, and the title thereto of the grantees of the State, will be reserved for the next chapter. Here only its rights to minerals in *private land* will be discussed, except that for the sake of convenient classification the beds of navigable streams will here be included.

I. IN MINES OF THE PRECIOUS METALS.

Whether the right of the king at the common law to all mines of gold and silver vests in the State as the successor of the king may in many parts of the United States be still considered a question. The best-considered case is that of *Moore v. Smaw*, 17 Cal. 199 (1861), in which Field, C. J., rejected the doctrine as inapplicable to American institutions, holding that the regalian rights of the British crown were personal prerogatives and not an incident of sovereignty. This case overruled *Hicks v. Bell*, 3 Cal. 219 (1853), and the other California cases which had followed it. The doctrine of this case has not been universally accepted, however. In *Gold Hill Q. M. Co. v. Ish*, 5 Oreg. 104 (1873), the court, without considering the question, refers to the principle as conceded "that mines or precious metals belong to the eminent domain of the political sovereign." The prerogative right to royal mines was formerly asserted in New Jersey, as appears by the opinion of Sir Robert Raymond, Attorney-General,

and Sir Philip Yorke, Solicitor-General, upon application of Governor Burnet, Dec. 12, 1722. (Forsythe's Opinions, 158; Note to 30 N. J. Eq. 323.) In *Shoemaker v. United States*, 147 U. S. 282 (1893), it was decided that, by the grant of Charles I. to Lord Baltimore, all veins, mines, and quarries of gold, silver, gems, and precious stones passed to the grantee, he yielding to the king one-fifth of the gold and silver found from time to time; the confiscation of the proprietary's title in 1780 vested the same in the State of Maryland, which also became entitled to the king's one-fifth by the Revolution. And the act of cession of 1791 passed the title to gold mines in the District of Columbia to the United States.

It is not considered necessary to do more than refer to the few cases in which the above title has been discussed. Suffice it to say, that should it ever assume importance, it is extremely likely that the rule laid down by Judge Field, *supra*, would be followed; i. e. such rights are mere personal royal prerogatives, and have no existence in this country, as being opposed to the character of our institutions. The question is abstractly of small practical importance. Since the title to most, if not all, of the land in the United States is derived from grants by the sovereign, the right to minerals therein is governed by reservations in those grants or by the organic law of the States. In the absence of a reservation to the sovereign, the owner of the land is the owner of all the minerals therein. The question of this right of the sovereign to mines in the public domain, or to mines reserved in land that was once the property of the sovereign, is a distinct question not involving any question of regalian right.

In New York the State's right to mines of gold and silver and to certain other mines is asserted by the legislature.¹ And in Michigan the property of the State in the precious metals is declared, with the provision that rights arising therefrom shall not be enforced against citizens owning the fee of the soil which contains them.²

II. IN MINERALS IN THE BEDS OF NAVIGABLE STREAMS.

The beds of navigable rivers below low-water mark are the property of the State, and consequently so are the minerals found

¹ Rev. Stats., pt. 1, ch. 9, tit. II, secs. 1-5, p. 818. ² 2 How. Ann. Stats., secs. 5475, 5476.

therein. In the absence of a grant by the State of the right to take them, any one who appropriates them is, as against every one except the State, the owner. They are like the fish in the water, the property of him who takes them.

But as against the State, one who appropriates these minerals, without a grant thereof, is a trespasser. He may at the suit of the State be enjoined from taking them, or be compelled to respond in damages. The title to the soil or the minerals under navigable rivers may, however, be granted by the State;¹ but it will not pass under a grant of the land upon the shore, and a grant of a portion of the bed of a stream will not carry the right to mine under an island within its boundaries.

Coosaw M. Co. v. South Carolina, 144, 550 (1892), United States. affirming s. c. 47 Fed. 225. By act taking effect March 1, 1870, the State granted to a certain person the right for the full term of twenty-one years to dig, mine, and remove phosphate rock and phosphatic deposits from the bed of the navigable streams and waters within the jurisdiction of the State. For this privilege the grantees were to pay a license fee of five hundred dollars and a royalty of one dollar a ton. The Coosaw Mining Company succeeded to all the rights given by this act.

On March 28, 1876, the legislature of South Carolina passed an act "to settle definitely the period at which returns shall be made of phosphate rocks and phosphate deposits dug and mined in the beds of the navigable streams and waters of the State of South Carolina, and the royalty which shall be paid thereon, and also to fix the terms on which this act may be accepted by the parties named therein." This act, after reciting differences as to the times and manner in which returns should be made and royalty paid, makes definite provisions on the subject, and then provides "that the said Coosaw Mining Company, on accepting the terms of this act within ten days from the passage thereof shall thenceforth have the exclusive right to occupy and dig, mine and remove phosphate rock and phosphatic deposits from all that part of the said Coosaw River above mentioned, so long as and no longer than they shall make true and faithful returns . . . and punctually pay the royalty," etc.

The mining company under this act acquired the exclusive right, not perpetually, but only for twenty-one years from March 1, 1870. This construction results both from an application of the rule requiring public grants to be favorably construed for the government, and, independently of that rule, from the legislative intent as disclosed by the language of the statutes.

¹ Pennsylvania, Act April 11, 1848, June 9, 1891, ch. 4043, p. 74; Act May P. L. 533; Act March 24, 1849, P. L. 30, 1893, ch. 4179, p. 113; South Carolina, 225; Act April 16, 1856, P. L. 365; Act Civ. Stat. Laws, 1893, secs. 87-206; Crim. April 18, 1864, P. L. 437; Florida, Act Stats. 1893, sec. 515.

Florida. State v. Black River Phosphate Co., 27, 276 (1891). A bill in equity alleging that a certain stream within the State is, in fact, navigable for the purposes of public commerce without a direct averment that the State is the owner of the bed of such stream or of the deposits therein, does not allege the title or right of the State with sufficient certainty as to warrant the granting of an injunction to restrain the removal of phosphatic or other deposits therefrom. Demurrer sustained on ground of insufficiency, uncertainty, and vagueness.

"The importance of a direct averment of a present title or ownership in the State to the bed of the stream in question becomes further apparent when it is considered that even though the State does, by virtue of her sovereignty, own and control the entire beds and all deposits therein of all streams within her borders that are, in fact, navigable by the public, in the conduct of useful commerce thereon, whether the waters of such streams be salt or fresh, and whether the tides of the sea ebb and flow therein or not, — a rule that we are of opinion should obtain here upon the great weight of the American authorities, — yet the proprietary rights of the State therein, prior to the time of the filing of the bill, may have been granted away by one or the other of the sovereignties, — Spain and England, — to both of whose dominions belonged at different periods the territory now known as the State of Florida, to say nothing of the possibility of the existence of a grant anterior to the bill by the State herself, if it should be found that through her legislature she had the power to make such grant."

State v. Black River Phosphate Co., 32, 82 (1893). The act of Dec. 27, 1856, known as the Riparian Act of 1856, vested the title to lands covered by water of navigable streams to the line of the channel in the riparian owners, and gave them the right to build wharves, to fill in and to erect warehouses. This act did not confer any other rights in or to the submerged land, except those expressly conferred by the act. Consequently it did not give riparian owners the right to take phosphates out of the bed of navigable waters between their land and the channel.

Raney, C. J.: "At the time of the passage of our riparian act the navigable waters of the State and the soil beneath them, including the shore or space between high and low water marks, were the property of the State, or of the people of the State in their united or sovereign capacity, and were held not for the purpose of sale or conversion into other values or reduction into several or individual ownership, but for the use and enjoyment of the same by all the people of the State for, at least, the purposes of navigation, and fishing, and other implied purposes; and the law-making branch of the government of the State, considered as the fiduciary or representative of the people, were, when dealing with such lands and waters, limited in their powers by the real nature and purposes of the tenure of the same, and must be held to have acted with a due regard for the preservation of such lands and waters to the uses for which they were held."

The acts of June 7, 1887 (ch. 3826), and June 9, 1891 (ch. 4043),

permit the taking of phosphates from the beds of navigable waters, and prescribe the terms and conditions on which they may be taken; these statutes apply to riparian owners falling within the provisions of the act of 1856.

Pennsylvania. *Brandt v. McKeever*, 18, 70 (1851). A grant by the State of a portion of a bed of a river under a statute authorizing the issuing of warrants vesting the "right to dig and mine for iron, coal, limestone, sand, and gravel, fire clay, and other minerals," does not pass the soil. This and the sand deposited there by the current belong to the State, and the grantee could not maintain trespass against one digging and taking away such sand.

Solliday v. Johnson, 38, 380 (1861). Stones taken from the bed of the Delaware, a public navigable river, belong to him who gathers them. In an action against one who has carried them away, it is not a valid defence that they are the property of the State.

Wyoming Co. v. Price, 81, 156 (1876). Land acquired by the Commonwealth under the legislation providing for the construction of the Pennsylvania Canal, vested absolutely in fee in the Commonwealth and its grantees. A riparian owner had no interest or title therein or in the coal under the canal.

A. occupied a colliery adjoining the land of B., and mined over his line into B.'s land. A. then agreed to pay B. for the coal mined, and all that he might mine for eight months thereafter. B.'s land lay on both sides of the canal, and A. mined under the canal between B.'s lots. *Held*, that the relation of landlord and tenant did not exist between A. and B. so as to prevent A.'s denying B.'s title to the coal under the canal.

Penn. Co. v. Winchester, 109, 572 (1885). Act of April 11, 1848, provided for application, survey, and grant of a quantity not exceeding one hundred acres of the bed of any navigable river, the warrantee to have the right to dig and mine for minerals.

This does not give to the patentee the right to mine under an island within the boundaries of his grant, which, under prior existing laws, was subject to application and sale.

A subsequent grantee of such an island may maintain ejectment against patentee for so much of said island as was above low-water mark at date of application and survey of said patentee.

Gilchrist's Appeal, 109, 600 (1885). The city of Wilkes-Barre is bounded on the northwest by the low-water mark of the Susquehanna River, while the borough and townships on the opposite side of the river are likewise bounded by low-water mark thereon. After the erection by the Commonwealth of said municipalities the coal beneath the bed of the river was conveyed by the Commonwealth to private parties. *Held*, that such coal cannot be taxed by the city of Wilkes-Barre, it not being within the limits thereof.

South Carolina. *State v. Guano Co.*, 22, 50 (1884). Title to soil in all navigable streams in which the tide ebbs and flows remains in the State, and does not pass under her grant of the superjacent land. A grant by the State of the lands on the shore of the navigable tidal channel gives title only to high-water mark. The State holds the beds of the channels of her tidal navigable streams

for the public use of her citizens. Such property may be disposed of by an act of the legislature, but may not be granted by her officers as "vacant land." The fact that the State has granted the right to another corporation to dig and mine for phosphate rock in these streams does not prevent the State from bringing this action to assert her title to the soil.

The value of the phosphates taken by the defendant corporation from the soil of the State should be estimated at the value of the phosphates, less the amount defendant has added to their value by their removal and preparation for market, defendant having acted under an honest but mistaken belief in its right to these phosphates.

III. IN MINERALS UNDER PUBLIC HIGHWAYS.

Where the title to the roadbed is in the State or the municipality, the title to the minerals therein or thereunder is likewise in the State or the municipality. But if the public have only the right of passage, and the title to the land subject to this is in the adjoining owner, the property to the minerals is in such adjoining land-owner, subject only to the obligation not to interfere with the rights of the public.

This last statement is equally applicable to private ways. The owner of the right of way has no property in the soil or the minerals therein. These belong to the owner of the servient tenement, subject only to the obligation of surface support of the road. When the owner of land dedicates streets thereon to public use, reserving therefrom the minerals, and subsequently conveys lots described as bounding on such streets, the grantees succeed to the right to the minerals which was possessed by the original owner. Whether the stone, gravel, and soil excavated from such a highway may be used at other points for the construction and repair of the road has been questioned, but the general opinion is that such a use is authorized.¹

United States. Lyman v. Arnold, 5 Mason, 195 (1828) C. C. D. R. I. A liberty granted in a deed "to dig a canal through the grantor's land" does not include as an incident the proprietary interest in the soil when dug up and removed.

¹ In Kansas, cities may by contract dispose of the right to mine beneath the streets, subject to the duty to make compensation to owners of private property for injuries done by the operations. Kansas Gen. Stats. 1889, secs. 3840-2. In Ohio;

by act April 13, 1894, 90 O. L. 149, the owners of land over which a highway passes may mine thereunder with the consent of the municipal authorities, upon giving security.

Story, J. : " If the use of a thing is granted, whatever is necessary for the enjoyment of such use or for the attainment of such use is by implication granted also. But if it be not necessary, but may be convenient only, it is not granted. So, too, grants are to be construed according to the subject-matter and the natural presumptions arising from their terms, and thus to render them expositions of rational intentions. If a contract is made allowing a person to dig coals or turf in another's land, the law presumes that the coal or turf is to belong to the grantee. . . . If he had no interest in the things for the labor bestowed upon it he could have no recompense, and the grant as such would be utterly worthless and nugatory. . . . Where a highway is made over another's land, the soil still remains in the owner subject to the easement. . . . The mere fact that a person having a grant of a privilege, servitude, or easement in another's land bestows his labor upon the soil, or separates and gives it value thereby, constitutes no sufficient ground to infer a change of property in the soil, for such labor is bestowed in order to enjoy such privilege, servitude, or easement."

The principal franchise or servitude is the canal, of which there may be the most perfect enjoyment without the ownership of the soil taken out. That may be a convenience, but is not necessary, and therefore not incident to the grant.

Georgia. *Smith v. Rome*, 19, 89 (1855). A gift of the right of way is not a gift of the earth and other minerals which may exist within the boundary lines of the way. The owner of land upon which was a quarry gave the city a right of way for a street. To cut out and take the rock and use it for macadamizing streets amounts to waste, and may be restrained by injunction.

Illinois. *Matthiessen & Hegeler Zinc Co. v. La Salle*, 117, 411 (1885). A party owning city lots has no right to make a subterranean passage from one to another through the underlying soil of a public street, the fee of which is not in him, but in the city to the use of the public, in order to mine and remove minerals, even though no injury may thereby result to the street as such.

Union Coal Co. v. La Salle, 136, 119 (1891). Where the fee simple of the land covered by streets is in the municipality, the title to underlying minerals is also in the municipality, which may maintain trespass against any person removing such minerals without its consent, although no injury is done to the street.

Bundy v. Catto, 61 Ap. 209 (1895). The public have an easement in the soil of a highway, not only for travel, but for using it in a reasonable and proper manner, to keep the road in repair and improve it. Gravel may be taken from one part of a highway and used to repair another part, regardless of the ownership of abutting lands.

Iowa. *Des Moines v. Hall*, 24, 234 (1868). Under the law of this State the laying off and recording of a town plat vested in the corporation the fee simple of the streets thus dedicated to public use. In such a case neither the original proprietor nor his grantee has any right to deposits of coal within the limits of the streets, and the corporation may maintain an action against him for coal mined and taken by him from beneath the same.

Kansas. *Tousley v. Galena M. & S. Co.*, 24, 328 (1880). The owners of a tract of land on which a city was located filed a plat in accordance with the statutory requirement, and dedicated the streets and alleys to public use, but reserved to themselves all the minerals under the surface of such streets and alleys. The lots were subsequently conveyed by general warranty deeds without reservation or condition. *Held*, these conveyances passed the grantor's title to the middle of the street, and consequently passed the minerals. The grantor was not entitled to an injunction against mining under the streets.

Kentucky. *Hawesville v. Hawes*, 6 Bush, 232 (1869). Where the absolute title to the streets and not a mere easement for the use of the public is vested in the trustees of a town, such trustees own the coal under the surface of the streets. If that coal has been mined and removed by the lessee of the heirs of the individual who gave the land for the streets to the town, the trustees may waive the tort, and sue the said heirs for the rental received as money had and received.

Minnesota. *St. Anthony Falls Water Power Co. v. King Bridge Co.*, 23, 186 (1876). Plaintiff dedicated to public use as a highway, a strip across its land, connecting a street with a bridge which the city of M. contemplated building. The defendant made a contract with the city to build the bridge, and entered into an agreement with the plaintiff, by which the latter agreed that the defendant might take all the stone which it might need in constructing the bridge from the plaintiff's land, for which defendant agreed to pay at a certain rate per perch for stone taken irrespective (so found the jury) of the part of the land from which the stone was taken.

Held, the plaintiff might on this contract recover as well for stone taken from the dedicated land, and which it was necessary to remove for the purpose of placing the bridge, as for that taken from the undedicated land of plaintiff. In the absence of contract the defendant would have been entitled to use the rock which it was necessary to remove in order to make a place for the bridge. Upon the dedication of land as a highway the public acquires the right to remove and use the stone therein in the construction of the highway. The defendant, however, had not the right to use this without the authority of the municipality. This authority was implied, so far as indicated above.

Missouri. *Friend v. Porter*, 50 Ap. 89 (1892). Plaintiff having sunk a shaft within the lines of a city street, sold the same with a license to take minerals from adjacent lots. In an action for the purchase-money, it was *held* he could not recover because —

1. "The street having been dedicated to public use as a thoroughfare, no private party (not even the city itself) had any authority or right to use it for any other purpose."

2. The maintenance of the shaft was a nuisance, and the contract was void as intending the performance of an act forbidden by law.

Snoddy v. Bolen, 122, 479 (1894). The owners of a tract of land laid the same off into lots, streets, and alleys, and dedicated the streets and alleys by a deed to the county, which excepted "the right to all

valuable minerals in said land, which we hereby reserve, together with the right to mine the same." The lots were subsequently conveyed by number, without reference to the minerals underlying the streets. The lot-owners were held to be entitled to the minerals under the streets. The rule is that a conveyance of land bounded upon a public street carries the fee to the middle of the street, unless a contrary intent is clearly expressed. The rule is not changed by the fact that the minerals under the street were excepted from the grant to the county.

IV. IN MINERALS CONTAINED IN LANDS TAKEN BY EMINENT DOMAIN.

A. *Property in the Minerals upon or under the Lands appropriated.*

Where land is taken by a railroad or similar company, the company has only a right of way. It has no property in the minerals below the bed of the road, but it may remove and use the stone necessarily excavated in making the bed of the road.

Whether such a company may go further and excavate stone upon the right of way, to repair the road, is in dispute. The better opinion seems to be that the company has no such right. Its right is a right of way, and the soil and minerals therein still belong to the owner of the land, who may excavate them, provided he leaves sufficient support for the road.¹

Indiana. *Smith v. Holloway*, 124, 329 (1890). The grant of a right of way to a railroad company being the grant only of an easement, the owner of the fee remains the owner of springs, streams, and minerals. He may not interfere with the free use of the right of way, but subject to this use he may make all lawful use of the land.

Kentucky. *Kelly v. Donahoe*, 2 Metc. 482 (1859). The condemnation of land by a turnpike company invests the company only with the right to use the land for the purposes of the road. Such a company having, by its charter, the right to make such excavations, fills, and embankments as the proper construction of the road, according to its prescribed grade and width, renders necessary, has, as incidental to this right, the right to quarry and remove stone and earth from one point to another within the lines of the road, and from the lands of one person to that of another. But it has not the right to the quarries and soil under the road for the purpose of repair-

¹ In Nevada it is unlawful to mine road without the company's consent. Gen. Stats. 1885, sec. 887.

ing it. "The proprietor retains the exclusive right to the land, and to all mines, quarries, springs of water, etc., and the right to use the same for every purpose not inconsistent with the public right of way, and with the rights and franchises of the corporation."

Evans v. Haefner, 29, 141 (1859). When land is taken. **Missouri.** by a railroad company under right of eminent domain, the minerals found above the grade of the road, whose removal is necessary for the construction of the road, belong to the company; those below the bed of the road, whose excavation is not necessary, remain with the owner of the soil.

Stokely v. Bridge Co., 5 Watts, 546 (1836). An **Pennsylvania.** incorporated turnpike company has the right to dig stone, clay, and gravel within the limits of the road for improvement and repair, and is not thereby subject to an action by the owner of land.

Lyon v. Gormley, 53, 261 (1866). One who builds an underground railroad through the land of another, under the provisions of the Lateral Railway Act, does not gain a property in minerals displaced by him in the opening of the road. He only gets a right of way which becomes a servitude on the land, but does not divest the owner of his title to the minerals.

B. Mine-owner's Rights, and Restrictions upon him by Reason of the Exercise of the Dominant Right. Damages for the taking.

When land is taken by right of eminent domain, the owner of the minerals owes surface support to the owner of the right of way, and also support of such structure as the company that exercises the right may be entitled to erect, — as a railroad or bridge, — together with such burden of travel and means of transportation as may at any time be placed thereon.

He may not mine under it so as to endanger the use of it by the road-owner.¹ And if he does so, or threatens to do so, he may be enjoined. This obligation of the owner of the minerals may, however, be altered or released by contract with the road-owner, but not by a contract between the owner of the minerals and the owner of the surface.

The owner of the minerals is entitled to damages for the taking of a right of way over the land. If the ownership of the minerals is distinct from that of the soil, the right to damages is distinct. These are to be measured by the difference in value as mining land if there is not a severance, as a mineral estate if

¹ In Nevada he may not mine at all without the company's consent. Gen. Stats. 1895, sec. 887.

there is, before and after the taking. This value is to be arrived at by a consideration of all the circumstances which determine the amount of support required. The specific value of the minerals is not the measure: it is the depreciation in the market value. Therefore the amount of support needed, the probable length of time and the possible danger, are elements that enter into the calculation of damages to the extent that they may affect the market value, but not otherwise; and this value as mining property includes advantages from the internal arrangement of the mine and the appliances therein provided, as well as transportation facilities. But where the mineral is as yet undeveloped, the fact that the land-owner when he opens his mines will be put to additional expense and inconvenience is not a subject of damage.

The uncertainty of the value of mining land does not deprive it of a value. A prospect may have a market value, and expert evidence is not inadmissible because founded on it. If the company exercising the right of eminent domain releases the owner of the minerals from the right of surface support, this fact must be taken into consideration in determining the damages, but the company is not bound by such a release by the owner of the surface to the owner of the minerals.

Mining claims on the public domain are liable to be taken by right of eminent domain like any other property, and in some States (Colorado and Wyoming) there are special statutory provisions for their condemnation. But they are not subject to rights of way under the provisions of U. S. Rev. Stats. 2477, which are applicable only to unappropriated land.

In the condemnation of a "claim" on the public domain, the owner may prove its value for town-lot purposes or as a mining claim, but *not as both*. The fact that title to land has been acquired under the mining laws of the United States is not evidence that it contains valuable mineral deposits.

United States. Montana Ry. Co. v. Warren, 137, 348 (1890), affirming s. c. 6 Mont. 275. A railroad took for its roadway a part of a patented mining claim. Adjoining this was another claim, which had been developed and proved to contain a vein of great value. The claim in question had been developed so far as to indicate that possibly, perhaps probably, the same vein extended through its territory, but this could not be affirmed as a fact proved. The testimony of persons who knew the land and its

surroundings, as to their opinion of the value of the land, was admissible to show the damages of the owner thereof. A mining prospect may have a market value. Its uncertainty the railroad cannot take advantage of.

Colorado. *Twin Lakes H. G. M. S. v. Colo. M. Ry. Co.*, 16, 1 (1890). In proceedings for condemning a right of way for a railroad over a mining claim it was not error to charge the jury: "That in determining the compensation for the land taken, and the resulting damages, if any, to the remaining land, they may consider not only the uses and purposes to which it is now applied, but also any other reasonable use to which it may be adapted or might be appropriated by men of ordinary prudence and judgment. That if they believe from the evidence that the land contains deposits of gold, they may consider that fact as bearing upon the question of the value of the premises; and that if the presence of gold enhance either the market value or the intrinsic value thereof, due weight must be given to that fact; but that if the value is not thereby increased, the mere fact that gold can be found upon the premises should be disregarded. That the facts that the land is designated as 'placers,' and that title thereto was acquired under the mining laws of the United States, constitute no evidence either that the ground in question contains valuable deposits of gold or other mineral, or that the same are valuable for placer purposes."

Kentucky. *Morris v. W. & R. R. T. P. R. Co.*, 4 Bush, 448 (1868). A shanty put up and occupied for the sole purpose of preventing the condemnation of a stone quarry, and not in good faith for a dwelling-house, will not entitle the owner to the exemption of quarries within two hundred yards of a dwelling-house, as provided in chap. 103, Rev. Stats.

Missouri. *Chicago, Santa Fe, & Cal. Ry. Co. v. McGrew*, 104, 282 (1891). The damages paid for land condemned for railroad purposes, on which the owner has a coal mine and appliances, should be a compensation for the whole of the property as it remained at the time the appropriation was made, in view of the uses to which the land appropriated was to be applied. The damages should not be confined to the surface and machinery, but should also apply to the internal arrangement of the mine and the appliances therein provided for its economical and successful operation, and to all the external arrangements which add to its value. Previous transportation facilities which are cut off are to be included, and the benefit accruing from the construction of the railroad by way of increased facilities for marketing the product of the mine should be deducted from the damages.

Montana. *Robertson v. Smith*, 1, 410 (1871). Rev. Stats. 2477, provides "that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." This only gives a right of way over public land not otherwise appropriated, and not over mining claims located in accordance with the provisions of the act. Such lands cannot be taken for a public highway unless there is a legislative provision for just compensation to the miners.

In section 1 of this act the words "subject to such regulations as may be prescribed by law" is merely a reservation of the right to regulate by legal enactments the manner and conditions under which claims must be worked by miners. And the clause "subject also to the local customs or rules of miners in the several mining districts" relates to the rules, customs, and regulations regarding the location, uses, and forfeiture of mining claims.

Mountain Ry. Co. v. Warren, 6, 275 (1887), affirmed in s. c. 137 U. S. 348. In proceedings for the condemnation of a mining claim for railroad purposes, the owner may prove its value as a "prospect" and for town-lot purposes, but his recovery is confined to the value for one purpose or the other.

People v. Eldredge, 3 Hun, 541 (1875). The owner of the gypsum or plaster on certain lands, with the right to mine and remove the same, has an estate or interest in the lands distinct from that of the owner of the soil, which gives him a right to damages for injuries caused by the laying out of a highway over such lands. The measure of damages is the difference in value of the estate in the minerals without the road and with the road as laid out.

Searle v. R. R., 33, 57 (1859). Where a railroad by right of eminent domain takes coal land which has never been mined, the measure of damages is the value of the land taken, and the actual damages arising from the manner in which the road went through the land and affected the improvements, and not the value of the coal under the surface. Nor is it the subject of damages that the owner, when he opens his mines, will, by the existence of the road, be put to expense and inconvenience in working them.

Brown v. Corey, 43, 495 (1862). Proceedings may be had against an owner of a stratum of coal, as contradistinguished from the owner of the surface, where there has been a severance of the estates to obtain an underground right of way under the Lateral Railroad Law.

Lawrence's Ap., 78, 365 (1875). A railroad company constructed their road without legal proceedings to appropriate the land on which it was located, and without objection by the owner. Afterwards proceedings to assess damages were begun, but were compromised and released. *Held*, company's title was not through these proceedings, but by the original occupation, without objection by the owners.

After the construction of the road, but before the release, the land was leased. *Held*, that the lessees took it subject to the railroad's right of way, that the latter was entitled to surface support, and the lessees were enjoined from mining so as to endanger it.

Mine Hill & S. H. R. R. Co. v. Lippincott, 86, 468 (1878). The railroad company having built its road over a tract of land, entered into an agreement with the owners, by which the latter released all claims for damages and for the use and occupation of the ground and the right of way, and the company agreed that the tenants might mine the coal in the land as though the railroad had not been constructed thereon; that upon notice that the coal beneath the road was to be mined they would take measures necessary to protect the road, or,

if this was not possible, to relocate the road on suitable adjacent land. The railroad on notice refused to do so, and enjoined the tenant from mining the coal which supported the road. *Held*, the company was liable in damages for the breach of contract, and that the tenant might bring an action therefor in the landlord's name. The measure of damages was the value of the coal left standing, and a release by the landlord would not defeat the tenant's right of action. A sale by the tenant of all his right, title, and interest in the colliery did not pass his right to damages for this breach of covenant.

Reading & P. R. R. Co. v. Balthaser, 119, 472 (1888). In proceedings for the recovery of damages for the location and construction of a railroad, though the character of the land as mineral land is a proper subject for consideration in estimating the damages, yet it is error to admit in evidence an estimate of the specific value of the mineral beneath the surface for the purpose of either recovering the value of the mineral itself, or as an element to determine the market value of the land. "The value of the plaintiff's land as limestone land was a proper subject of consideration both by the witnesses and the jury in estimating the damages, but not the value of the stone under the road. . . . The doctrine of *Searle v. The Railroad* has never been departed from, nor is it likely to be. It is founded upon sound principle and practical common sense."

Penn. Gas Coal Co. v. Versailles Fuel Gas Co., 131, 522 (1890). If in addition to severing the coal from the surface by a sale, the owner releases his vendee and the underlying estate from the obligation of surface support, the release is binding upon him and those taking title from him, but it cannot bind the State or its grantee entering by right of eminent domain.

In case of such entry the owner of the subjacent strata is entitled to compensation, and the damages are to be ascertained not by a calculation of the quantity of coal, but by the effect of the appropriation on the tract as a whole.

If the appropriating corporation has no knowledge of the release of the right of support, or fails to tender bond to the owner of the coal, the latter's remedy is by bill for injunction or proceedings to obtain an assessment of damages.

"If the latter mode be adopted, the amount of support needed, the probable length of time the structure may remain in place, the possible danger from its use, are elements that enter into the calculation of the damages to the extent that they may affect the market value of the underlying estate, but not otherwise. If the proceeding by bill be chosen, we see no reason why the owner of the subjacent stratum has not a right to require security to be given before the appropriation of his coal to the support of the surface is made by the corporation entering upon the surface for the construction of its railroad, canal, or other line of transportation.

"As we have already said, the character of the structure to be put upon the surface, the use to which it is devoted, the depth below the surface at which the vein of coal is found, and the regularity of the geological formations, are circumstances to be taken into account in determining the amount of support needed, and of the compensation to which the coal-owner is entitled."

McGregor v. Equitable Gas Co., 139, 230 (1891). An entry upon land by virtue of the right of eminent domain confers a right to have the surface, or in the case of a gas-pipe line the portion of the ground through which the pipe runs, supported by the subjacent strata; but the Commonwealth's grantee is not bound to include this servitude in the easement appropriated. He may release the landholder from this burden, in which case "he ought to pay not the value of the coal in place, for the title to the coal does not pass to him, but the depreciation in price of the property by reason of the servitude imposed upon it.

"If he does release the right of support from the coal or other mineral underlying the surface, then the owner of the coal may mine and remove it as freely and fully as though no entry had been made upon the surface, and for that reason it should not be taken into consideration in adjusting the damages to the land-owner."

Danger of escape of gas into the mine by reason of subsidence that would be caused by mining the coal beneath the pipe line, and other dangers that might result from negligence, are excluded from consideration in the determination of damages, as remedies are provided therefor by the law.

Davis v. Jefferson Gas Co., 147, 180 (1892). The right of a corporation appropriating land under the right of eminent domain for a pipe line for the transportation of natural gas, to insist upon support from the underlying coal, is an element for consideration in the ascertainment of compensation to the land-owner, not by estimating the value of the coal supposed to be necessary to remain to afford support, but by considering the extent to which the value of the tract as a whole is affected.

Therefore it was error to refuse an offer "to prove the character of the soil through which defendant's pipe line runs, the depth of the line below the surface of the ground, the proximity of defendant's line to the surface of the underlying coal, the danger of the surface falling in when the coal is removed, the probable breaking of defendant's pipes, the danger of gas escaping into plaintiff's mine; and that for the purpose of showing the general depreciation in the market value of plaintiff's property."

It was likewise error to refuse to charge "that the easement of the defendant company obtained under the right of eminent domain carries with it the right of support for its lines; and the owner of the land has no right to remove coal or other minerals under said lines, to their injury or detriment;" "that the right of the plaintiff to use the ground appropriated by defendant company, which, in this case, is a strip ten feet in width and seven hundred and ten feet in length, is subordinate to the superior rights of the Jefferson Gas Co.; and this superior right to use the ground so appropriated extends to all the minerals underlying said line, including the coal, the removal of which would endanger the safety of the pipes of defendant company."

Though a release by the corporation of its right to damages for injury to its lines by the removal of the underlying coal may operate as an estoppel against a claim by the corporation for such damages, yet such release will be ineffectual as against the coal-owner's right

to compensation for the risk of injuries to the mine in the operation of the pipe line.

Wallace v. Jefferson Gas Co., 147, 205 (1892). In an action to recover damages for injury to coal lands, it appeared that a gas pipe sixteen inches in diameter was laid on plaintiff's land at a depth of three feet below the surface. The underlying coal was at a varying distance below the surface, ranging between eighty-seven and a half and two hundred and seventeen feet, the average depth being about one hundred and forty-three feet. A number of witnesses testified that it was necessary to leave a wide strip of coal permanently underneath the pipe; that if such a strip was not left there was danger of the pipe breaking and the gas being liberated into the mine below. None of this testimony was based upon any instances known to the witnesses where such breaks had occurred. *Held*, that the testimony should be excluded.

Evidence of the depreciation of the market value of land founded upon the supposed increased expense of mining coal, caused by the construction of a pipe line, is inadmissible, as too remote and speculative.

Where a pipe-line company releases to the land-owner the right of support for its pipe, the element of possible damage from subsidence of the surface will not be considered.

CHAPTER VI.

THE GOVERNMENT'S TITLE AND THE GRANT THEREOF.

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| I. What Land is open to Location as Mineral Land. | A. Citizenship of the United States the Essential Requisite. |
| II. Who may locate a Mining Claim. | B. Other Qualifications of Locators. |
| | C. Location by Agent or Partner. |

WHERE minerals are found in lands which are the property either of the State or National government, they, in the absence of right in some one else derived from grant or reservation, belong to the State or Nation. The government in such case has the same rights as a private individual, owning everything which is of the realty, from the centre of the earth to the heavens.¹

It is the policy, however, of both the National and the State governments to dispose of their lands to the people. This, as a rule, is accomplished by grants or sales, under general statutory systems, according to which mineral lands are segregated from lands of other kinds.

We shall deal here only with the mineral land system of the United States, that being the important system, owing to the fact that the great mineral deposits of the West have been discovered upon the public domain of the United States.²

From the foundation of the government until 1866 the settled policy of the United States was not to part with the ownership of

¹ As to the title of the government to minerals where the overlying surface had been granted by the Mexican government before the cession to the United States, see *Moore v. Smaw*, 17 Cal. 200.

² For the systems of the States by which their mineral lands are disposed of, the reader is referred directly to their statutes. Their importance is so limited that extended exposition of them is obviously needless. California, Act March 28, 1874; Polit. Code, 1885, sec. 3503; Michigan, 2 How. Ann. Stats., secs. 5355-

8, 5477, 5480-90; Minn., Gen. Stats. 1894, secs. 4076-82; Act April 24, 1895, ch. 105; *Whiteman v. Severance*, 46 Minn. 495; *Baker v. Jamison*, 54 Minn. 17; Nevada, Act March 3, 1887, p. 102; New York, Rev. Stats. (8th ed.), pt. 1, ch. 9, tit. 11, pp. 818-19; *Moore v. Brown*, 139 N. Y. 127; Ohio, Rev. Stats. 1890, sec. 914; Texas, Act March 29; July 6, 1889, 21 Leg. p. 116; Wash., Gen. Stats. 1891, secs. 2246-62; Wis., Ann. Stats. 1889, sec. 220, p. 221.

its mineral lands. From every grant they were reserved, so that the courts took the view that, from this policy, an intention to do so was implied in all cases.¹

The necessity for a change of that policy is thus described by Miller, J., in *Mining Co. v. Keystone Con. Min. Co.*, 102 U. S. 167:

"Very soon after the conquest of California and its cession to the United States by Mexico, it was found to be rich in the precious metals, and such was the rapid influx of immigrants from the Eastern States that the California population at the time that it was organized as a State in 1850 was composed of mining camps and settlements engaged in mining these metals. As nearly all those mines were discovered on land the title of which was vested by the treaty in the government of the United States, it became important to determine what course the government would take with regard to this new source of untold wealth. The Spanish government, to which this territory and much other, rich in precious metals had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the crown, which made Spain, for a time, the richest of the civilized governments of the world. This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that with the territory, we had acquired the laws which governed the production of gold from the earth. Others believed that, whether this were so or not, it would be a wise policy for the government to secure to itself a fair proportion of the metal produced from its own ground. But while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and before a State could be organized had become its dominating element, with wealth and numbers and claims which demanded consideration."

While Congress failed to act, the miners made a law for themselves, as described below.² These customs and regulations of miners obtained the recognition of the legislature and the courts of California. The latter, to give a legal title to those who under these customary regulations were mining upon the public domain, adopted the fiction that the first appropriator of the public mineral land had a license to mine from the government, and if, in his

¹ *Morton v. State of Nebraska*, 21 Wallace, 660.

² Chap. X.

appropriation of the land, he complied with the regulations of the mining district, that license was protected as a property right.¹

By the act of July 26, 1866, Congress passed a law by which the title to mineral land might be acquired from the government at nominal prices. This and the act of May 10, 1872, so far as unrepealed, had been consolidated in Rev. Stats., Title XXXII., chap. 6, and, with the acts supplementary thereto, now govern exclusively the granting of mineral lands by the United States.²

These acts continued the system of free mining, held the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules, and recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. They proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached. It is particularly provided that existing rights shall not be impaired.

Title to mineral lands can be obtained only under these acts. "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." Rev. Stats. 2318. How that title may be obtained is the subject of the following chapters.

By Rev. Stats. 2345 mineral lands in Michigan, Wisconsin, and Minnesota are excepted from the provision of the Mineral Land Laws; by the act of May 5, 1876 (19 Stat. 52), 1 Sup. to Rev. Stats. 104, a similar exception is made as to Kansas and Missouri; and by act of March 3, 1883 (22 Stat. 487), 1 Sup. to Rev. Stats. 404, as to Alabama.³ In these six States mineral lands are acquired from the United States in the same way as agricultural land.⁴

I. WHAT LAND IS OPEN TO LOCATION AS MINERAL LAND.

By Rev. Stats., sec. 2319, "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsur-

¹ *Hicks v. Bell*, 3 Cal. 219; *Stoakes v. Intire*, id. 593; *Levaroni v. Miller*, 34 id. 231.

Barrett, 5 id. 36; *McClintock v. Bryden*, id. 97; *Fitzgerald v. Urton*, id. 308; *Tartar v. Spring Creek W. & M. Co.*, id. 395; *Burdge v. Underwood*, 6 id. 45; *Conger v. Weaver*, id. 548; *Boggs v. Merced M. Co.*, 14 id. 279; *Henshaw Clark and 103 Chinamen*, 14 id. 460; *Clark v. Duval*, 15 id. 85; *Smith v. Doe*, id. 101; *Gillan v. Hutchinson*, 16 id. 153; *Rogers v. Soggs*, 22 id. 444; *Rupley v. Welch*, 23 id. 453; *Ensminger v. Mc-*

² *Gelcich v. Moriarty*, 53 Cal. 217.

³ Special provision is made by this act as to coal and iron lands, as to which see Chap. XVII.

⁴ By act of Cong., March 3, 1891, sec. 16 (26 Stat. 1026), 1 Sup. to Rev. Stats. 929, all lands in Oklahoma are declared to be agricultural.

veyed, are declared to be free and open to exploration and purchase, and the land in which they are found, to occupation and purchase."

To render land, therefore, open to location as mining ground, three things are essential:—

1st. It must be land containing valuable mineral deposits.

Mineral deposits are whatever are recognized as such by the standard authorities on the subject.¹ They are valuable mineral deposits when they are of such value that they can be mined profitably. It must be borne in mind, however, that in making the statement we are discussing the question what lands are subject to location as mineral land. This test of the value of deposits is only applied when a contest arises between one claiming under a mineral location and another claiming under an entry of another kind. As will be seen when the subject of discovery is reached, a discovery of a trace of mineral is sufficient to establish the priority of a location, though the commercial value of the deposit be unproven.

2d. It must belong to the United States. It must be a part of the public domain at the time of the location.

3d. It must be unoccupied and unappropriated by others under claim of right.

Land answering these three essential descriptions is open to location; land lacking in any one of them is not.

In addition to the cases collected below, see also those under titles "Forfeiture," "Abandonment," "Relocation," "Conflicting Grants."²

United States. *Faxon v. Barnard*, 2 McCrary, 44, 4 Fed. 702 (1880), C. C. D. Colo. One in actual possession of mining ground who has discovered and uncovered the lode, but has failed to take the other steps required by law to complete his location, cannot be ousted by a subsequent discoverer from the ground actually held by him. A location cannot be extended over a senior discovery in the actual possession of another.

Belk v. Meagher, 104, 284 (1880). A location of a mining claim may not be made upon land already actually covered at the time by another valid and subsisting location. (See this case under Chaps. IX. and XII.)

Deffebuck v. Hawke, 115, 392 (1885). See this case under Chap. XVI., Div. I.

¹ For discussion of this matter the reader is referred to the Geological Preface.

² Chaps. XI, XII, and XVI.

Davis v. Weibbold, 139, 507 (1891). Field, J.: "By the act of May 10, 1872, to promote the mining resources of the United States the first section of the act of 1866, declaring the mineral lands of the United States free and open to exploration and occupation, was repealed, and in the place of it a provision was adopted declaring that 'all valuable mineral deposits' in lands belonging to the United States, both surveyed and unsurveyed, were free and open to exploration and purchase, subject to conditions similar to those in the original act. The Revised Statutes, which embody the law of the United States in force on the first of December, 1873, in its treatment of mineral lands, provided that in all cases lands valuable for minerals should be reserved from sale, except as otherwise expressly directed by law (§ 2318), but at the same time repeated the declaration that all valuable mineral deposits in lands belonging to the United States should be free and open to exploration and purchase (§ 2319). After that date title to mineral lands, known at the time to be valuable, could only be acquired under provisions specially authorizing their sale, except in certain States."

Francoeur v. Newhouse, 43 Fed. 236 (1890), C. C. D. Cal. Land is mineral land if the fact is so obvious that any one seeing it would know it to be so, even though it was not known to be mineral land, because no one had ever inspected it.

Gird v. California Oil Co., 60 Fed. 531 (1894), C. C. L. D. Cal. "The premises in controversy are oil-bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims." Ross, D. J.¹

Boggs v. Merced Min. Co., 14, 355 (1859). The United California. States could neither enter upon nor authorize an entry upon private property for the purpose of extracting mineral. Like any other proprietor they could only exercise the right to minerals in private property in subordination to such rules and regulations as the local sovereign might prescribe. Until such regulations are established, the proprietor of the land may successfully resist, in the courts of this State, all attempts at invasion of his property, whether by the direct action of the United States or by virtue of any pretended license under their authority.

Henshaw v. Clark, 14, 460 (1859). Where plaintiffs derived their title to land from a grant of the Mexican government, and a United States patent confirming the same, the land was private property, and defendants did not, as miners, have a license from either State or Federal government to enter upon the same and extract minerals therefrom.

Smith v. Doe, 15, 100 (1860). As a general rule, the public mineral lands of the States are open to the occupancy of every person who in good faith chooses to enter upon them for the purpose of mining, and under the provisions of the statute of California (Wood's Dig. 527) all lands are presumed to be public lands until title is shown to have passed from the government to private parties.

Morenhaut v. Wilson, 52, 263 (1877). "The instant an abandon-

¹ The location of petroleum lands is now regulated by act of Congress, Feb. 11, 1897.

ment takes place a vacancy in the possession occurs. The right of possession of the former occupant is absolutely lost, and the land becomes *publici juris*, and free to the occupation of the next comer, whoever it may be."

DuPrat v. James, 65, 555 (1884). Ground forfeited by failure to perform the amount of labor required by law is subject to instant relocation, although in the occupancy of the original locator.

Hall v. Arnott, 80, 348 (1889). A valid location or relocation can be made only when the ground is open to exploration and appropriation.

Colorado. *Armstrong v. Lower*, 6, 393 (1882). Only the unoccupied and unappropriated mineral lands of the general government are open to exploration and location. When a locator has fully complied with the law in locating his claim, he is entitled to exclusive possession and enjoyment thereof until it is forfeited or abandoned.

Montana. *King v. Edwards*, 1, 235 (1870). Upon forfeiture the ground of a mining claim becomes again unappropriated mineral land of the United States, and is open to relocation.

Nevada. *Golden Fleece G. & S. M. Co. v. Cable Con. G. & S. M. Co.*, 12, 312 (1877). When a mining claim has been forfeited by reason of non-compliance with mining regulations, or has been abandoned, or the locator is not a citizen of the United States, the ground is open to relocation.

Utah. *Eilers v. Boatman*, 3, 159 (1881). As between two locators, one cannot locate ground of which the other is in actual possession under claim or color of right, because such ground would not be vacant and unoccupied; but the possession of a vein recognized by the mining laws, to which protection is given, is the possession of one who holds the surface where the vein makes its apex. The location of a vein or lode made upon the surface, where it finds its apex, will not be defeated by secret underground working by parties having no possession of or right to the surface embracing it.

Washington. *Wheeler v. Smith*, 5, 404 (1893). Land containing a deposit of limestone, entirely devoid of ore, cannot be located under the mineral laws of the United States. "Mines as known to those laws embrace nothing but deposits of valuable mineral ores, and do not include mere masses of non-mineralized rock, whether rock in place or scattered about through the soil." "A mining claim, whether lode or placer, is not established or entitled to be patented under the mineral laws of the United States unless it contains some of the metals for which mining works are prosecuted."

The Stone and Timber Act of June 3, 1878, which authorizes the sale in Washington, Oregon, California, and Nevada of land chiefly valuable for stone, and which prohibits the acquisition of mineral lands under its provisions, shows an intention on the part of Congress to prohibit the acquisition of stone land under the mineral laws.¹

¹ *Freezer v. Sweeney*, 8 Mont. 508, all controversy on the subject of building to the contrary. The rule in *Wheeler v. Smith* was followed in the Land Office, but the act of Aug. 4, 1892, has settled stone by making deposits of such subject to location as placers.

LAND OFFICE DECISIONS.

Lands containing the following deposits may be located under the mining acts: Borax, Copp, 100 (1893), 1 L. D. 561 (1883); Diamonds, id. 88 (1872); Deposits of fire clay or kaolin, id. 121 (1873), id. 176 (1875); *Dobbs Placer Mine*, 1 L. D. 565 (1883); Iron, Copp, 124 (1873), 134 (1874); Roofing slate, id. 143 (1874); Umber, id. 161 (1875); Limestone or marble, id. 176 (1875); Mica, id. 182 (1875); Gypsum, 1 L. D. 560 (1881); Carbonate and nitrate of soda, sulphur, alum, and asphalt, 1 L. D. 561 (1883); Phosphate of lime, *Gary v. Todd*, 18 L. D. 53 (1894).

If these are found in veins or rock in place, the proceedings must be those prescribed for lode claims. If not so found, then they must be located as placer claims. Copp, 124 (1873); id. 134 (1874); id. 161 (1875).

Land may not be located as mineral land on the ground that it contains a deposit of brick clay: *Dunluce Placer Mine*, 6 L. D. 761 (1888); or hot mineral springs: *Morrill v. Margaret Min. Co.*, 11 L. D. 563 (1890); or aluminum, *Jordan v. Idaho Co.*, 20 L. D. 500 (1895).

Where land is of little value for agricultural purposes, but is essential to the proper development of certain mines, for running tunnels thereto, it will be withheld from sale as agricultural land and disposed of only under the mineral land law. Copp, 186 (1876).

Mineral lands within the limits of unconfirmed Spanish or Mexican grants in Arizona, reported to Congress for action, are reserved from sale and from exploration and location by mineral claimants. Copp, 308 (1881).

"Lands valuable for minerals," in Rev. Stats. 2318, means "lands which it will pay to mine by the usual modes of mining." *Townsite of Deadwood*, Copp, 324 (1881).

Whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land more valuable on this account than for agricultural purposes, is within the meaning of Rev. Stats. 2318, 2319. 1 L. D. 560 (1881).

Where the claim in effect is for a water right, only to develop placer claims at a distance, it is not competent to issue patent therefor as a placer claim. *Robt. S. Hale*, 3 L. D. 536 (1885).

Stone that is useful only for general building purposes does not render land containing the same, subject to appropriation under the mining laws, or except it from pre-emption entry. "Congress seems to have recognized the fact that a stone quarry is not a 'placer mine,' and it passed an act June 3, 1878 (20 Stat. 89), providing for timber and stone entries. The stone in the tract in controversy has no peculiar property or characteristic that gives it especial value, such as attaches to gypsum, limestone, mica, marble, slate, asphaltum, borax, auriferous cement, fire clay, kaolin, or petroleum, and its value in this particular mine appears to be its proximity to the town of Alexandria, which has come into some prominence, having been

chosen as a county seat since the entry in question was made." *Conlin v. Kelly*, 12 L. D. 1 (1891).¹

A tract of land chiefly valuable for a deposit of slate, and unfit for agriculture, may be entered under the Stone and Timber Act of June 3, 1878; whether it might be entered under the mineral laws not decided. *Parks v. Hendsch*, 12 L. D. 100 (1891).

Land chiefly valuable for deposits of building stone may be entered as placer mining claims under act of Aug. 4, 1892. *Minnekahta Stone Mine*, 15 L. D. 256 (1892).

Land containing deposits of sandstone of a superior quality for building, monumental, and other purposes may be entered as a placer claim. This case is distinguished from *Conlin v. Kelly*, 12 L. D. 1, in that in that case the equities were with the agricultural claimant, and the stone was useful only for general purposes and of little commercial value, "while in this case the stone is not only useful for those purposes, but also very valuable for the ornamentation of buildings, and for monuments and other commercial purposes." *McGlenn v. Wienbroeër*, 15 L. D. 370 (1892); *Van Doren v. Pledsted*, 16 L. D. 508 (1893).

Land chiefly valuable for the building-stone which it contains is not, by such fact, excluded from entry under the settlement laws.

It does not follow from the act of Aug. 4, 1892, "that land chiefly valuable for building stone shall be considered as mineral land, or that such land may not also be entered under the homestead law, or that it might not have been entered under the pre-emption law prior to its repeal. It then becomes a question of priority of the claims." Prior to the act, there was no authority for a placer location of such land, and such a location will not defeat a subsequent settlement claim initiated prior to the passage of said act. *Clark v. Ervin*, 16 L. D. 122 (1893).

Land embraced in an application for patent, but excluded therefrom when entry is made, is thereafter vacant public land, and may be properly included within the subsequent application of another, and a discovery on such tract is sufficient to support the later claim. *Adams Lode*, 16 L. D. 233 (1893).

Lands chiefly valuable for deposits of ordinary building stone are not excepted as mineral land from grants to a State for school purposes. The fact that the act of Aug. 4, 1892, provides that certain kinds of stone quarries may be entered under the placer laws does not warrant the finding that such stone quarries constitute mineral lands in the sense in which such lands are held to be excepted from grants. *South Dakota v. Vermont Stone Co.*, 16 L. D. 263 (1893).

Land containing stone useful only for building purposes is not thereby excluded from agricultural entry, though more valuable as a quarry than for agricultural purposes. *Hayden v. Jamison*, 16 L. D. 537 (1893).

Land containing stone suitable for making lime may be entered as a placer claim, or purchased under the Timber and Stone Act. Where there are claimants under both laws, priority of right prevails. *Shepherd v. Bird*, 17 L. D. 82 (1893).

¹ See footnote on page 199.

A placer location made prior to the act of Aug. 4, 1892, of land chiefly valuable for a deposit of glass sand and building stone, is not a legal appropriation, and a subsequent intervening homestead entry of another will defeat the right of the placer claimant to perfect his claim under said act. *Florence D. Delaney*, 17 L. D. 120 (1893).

Land containing a ledge of limestone may not be located as a lode claim. To exclude land from agricultural entry on the ground that it contains a valuable bed of limestone, it must appear affirmatively that it is more valuable on account of the stone than for agricultural purposes. *Long v. Isaksen*, 23 L. D. 353 (1896); *Wheeler v. Smith*, 23 L. D. 395 (1896).

II. WHO MAY LOCATE A MINING CLAIM.

A. *Citizenship of the United States the Essential Requisite.*

The mineral deposits upon the land belonging to the United States are open to location only by citizens and those who have declared their intention to become such. Rev. Stats. 2319.

What shall constitute proof of such citizenship is provided by Rev. Stats. 2321. The provisions of this section apply to litigation in the courts as well as to applications in the Land Office.

A location by an alien is void. But it may be validated by subsequent naturalization, in which case the location will date from the declaration of intention, and not from the making the location. It follows, therefore, that work done previously to the declaration of intention will enure to the benefit of the locator, but will not cut out intervening rights. And it is submitted, though it has been doubted, that a location by an alien may, if no other rights intervene, be validated by a *bona fide* conveyance to a citizen who takes possession and continues to perform the requirements of the laws; not so, however, if the conveyance is collusive.

The fact of citizenship is an essential to the validity of the location, and must be affirmatively proved by one who alleges a location, and its decision is a question for the jury. The presumption is that when the locator was a resident of the United States, he was at the time a citizen.

It has recently been held in the Court of Appeals of the Eighth Circuit that want of citizenship of a locator cannot be set up by any one except the United States. This decision is based upon the general rule that the right to defeat a title to realty on the ground of alienage is reserved only to the sovereign; and if the

case is not confined to its facts, and the principle laid down prevails, the result will be that ground located by an alien cannot be relocated until he has been deprived of his title by some act of the government, which ordinarily will not occur until there has been an application for a patent, and it becomes necessary for him to establish his right either as applicant or adverse claimant. In actions for the possession of unpatented claims, therefore, the want of citizenship would no longer figure.

Where the locator is a corporation, the members must all be severally qualified to make a location. It is consequently void if any of them is an alien. But where several persons have made a joint location, and one of them is an alien, the location is not entirely void, but only as to the interest of the alien. Though an alien may not locate a claim, he is not debarred by the above sections of the Revised Statutes from holding a claim acquired from a locator properly qualified.¹ Nor, consequently, is a corporation with alien stockholders, nor a foreign corporation, unless otherwise disqualified. The alien's title then arises by virtue of the conveyance, and his incapacity to hold the claim can only be objected to by the government. Such objection can, therefore, be raised upon his application for a patent, or upon an adverse claim to such application. But naturalization pending proceedings for a patent or on an adverse claim removes this objection.

Mineral entries will not be permitted by citizens who are mere agents of foreign corporations, or under contract to convey to such on obtaining patents.

United States. *North Noonday M. Co. v. Orient M. Co.*, 1 Fed. 522 (1880), C. C. D. Cal. If an alien performs all the acts necessary to make a valid location, and does the work necessary to keep the claim good, and then conveys the claim to a citizen who takes possession and continues to perform all the conditions required by law to hold such claim, such citizen acquires a valid title as against all persons who have not acquired rights before the conveyance.

If an alien and a citizen jointly locate a claim not exceeding the amount of ground allowed by law to one locator, such location is valid as to the citizen, and a conveyance from both to a citizen gives a valid title.

A corporation organized and existing under the laws of a State is to be deemed a citizen within the meaning of the statute, and as such is competent to purchase and hold a mining claim.²

¹ Idaho, Act March 2, 1891, p. 119; *v. Chisholm*, below, for different statement of this rule.

² See *McKinley v. Wheeler and Thomas*

North Noonday M. Co. v. Orient M. Co., 11 Fed. 125; s. c. 6 Sawy. 503 (1880), C. C. D. Cal. Same case on motion for a new trial.

The affidavit provided for in Rev. Stats. 2321 may be upon information and belief. The provisions of this section are not limited to the application in the Land Office for a patent. They apply to the litigation of all claims arising under the act, whether in the department or in the courts.

Cresus M. Co. v. Colo. L. & M. Co., 19 Fed. 78 (1884), C. C. D. Colo. Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made by him in locating a mining claim on the public mineral lands, provided no other rights have intervened. What he had done towards locating the claim accrued to him as of the date of his declaration of intention.

Wood v. Aspen Mining & Smelting Co., 36 Fed. 25 (1888), C. C. D. Colo. William J. Wood, the locator of a mine in controversy, was born in Canada, where he lived until 1870, when he moved to Kansas, leaving his wife and children in Canada. It appeared that an entry of public lands had been made in Kansas by a William Wood, who made oath at the time that he was a citizen, the head of a family, consisting of a wife and seven children, and that he and his family had resided on the land from September, 1870, to April, 1871. A witness testified that he saw naturalization papers issued in Kansas in such locator's possession, but no record of such papers could be found in that State.

Held, that the locator's title to the mine being of recent origin, the evidence of his citizenship was insufficient to support the same.

O'Reilly v. Campbell, 116, 418 (1885). Action on adverse claim. "Had the objection been taken in the court below that citizenship of the plaintiffs had not been shown, it might, if not obviated, have been fatal. There is, however, nothing in the record to show that it was raised below. Proof of citizenship in proceedings of this kind may consist, in the case of an individual, of his own affidavit thereof, and in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made upon his own knowledge, or upon information and belief. Rev. Stats., sec. 2321. The objection to the want of proof of that fact, if taken below, might have been met at once, if indeed the plaintiffs are citizens. The rule is general that an objection which might be thus met must be taken at the trial, or it will be considered as waived, except as to matters going to the jurisdiction of the court. The parties to this controversy own adjoining claims, and it is probable that the citizenship of each was known to the other, and therefore no proof on the subject was required. Be that, however, as it may, the objection in actions of this kind cannot be taken in this court for the first time." Field, J.

Hammer v. Garfield M. Co., 130, 291 (1889), affirming s. c. 6 Mont. 53. The oath of one of the locators of a mining claim accompanying the recorded notice of the location is, in the absence of contradiction, *prima facie* evidence of the fact of the citizenship of all the locators.

McKinley v. Wheeler, 130, 630 (1889). A corporation, created under the laws of one of the States of the Union, all of whose members are citizens of the United States, is competent to locate or join

in the location of a mining claim upon the public lands of the United States in like manner as individual citizens.

Billings v. Aspen M. & S. Co., 51 Fed. 338 (1892), C. C. App. 8th Cir. An alien who in conjunction with others has expended time, money, and labor in exploring for and locating a mining claim, may hold his interest, or recover the same if deprived thereof, as against his co-locators. No one can set up his want of citizenship except the United States.

Billings v. Aspen M. & S. Co., 52 Fed. 250, C. C. App. 8th Cir. (1892). Rehearing denied.

Persons other than the government can raise the question of the citizenship of a locator as mineral claimant only when he is seeking to obtain a patent for his claim. In that case he is required to prove his citizenship by Rev. Stats. 2,325. *O'Reilly v. Campbell*, 116 U. S. 418, distinguished on this ground.

Even if this is erroneous, it is unimportant, as it is found as a fact that the locator had declared his intention to become a citizen.

Manuel v. Wulff, 152, 505 (1894), reversing s. c. 9 Mont. 279. If in a contest under Rev. Stats. 2,326 one party who is an alien at the outset becomes a citizen during the proceedings and before judgment, his disability to take title under Rev. Stats. 2,319 is thereby removed.

"We do not think that the transfer of a mining claim by a qualified locator to an alien is to be treated as *ipso facto* an abandonment, or that the analogy of such a case to the casting of descent upon an alien can be maintained."

"As M. was a citizen, if his location were valid his claim passed to his grantee, not by operation of law, but by virtue of his conveyance; and the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the government only."

Jantzen v. Arizona Copper Co., 20 Pac. 93 (1889). It will be presumed that a resident of the United States who has made a mining location, was a citizen at the time.

Ferguson v. Neville, 61, 356 (1882). Rev. Stats. 2319 does not prevent an alien from purchasing a mining claim from one who, being a citizen of the United States, located the claim according to provisions of the act of Congress. The title having passed from the United States to the locator, the latter had a right to make any sale or disposition of the property not inconsistent with the laws of the State.

Lee Doon v. Tesh, 68, 43 (1885). In an action brought by several adverse claimants, in pursuance of Rev. Stats. 2326, to determine the right of possession to a mining claim, the complaint must allege that the plaintiffs are, or have declared their intention to become, citizens. If the complaint alleges one of the plaintiffs to be a citizen, and contains no allegations as to the citizenship of the others, the action should be dismissed as to the latter.

No title to mining claims on the public lands acquired by location, occupancy, and working prior to 1866 was or is valid as against the United States or its grantees. As against the government, such occupants were trespassers, and, not being citizens or having declared

their intention to become such, had no rights to be protected by the act of 1872.

Anthony v. Jillson, 83, 296 (1890). One who is not a citizen of the United States, and has not declared his intention to become such, cannot make a valid location of public mineral land. So held of one who filed his declaration of intention the day after he attempted to make a location.

Persons claiming right to a patent under Rev. Stats. 2,332, on ground of possession, must show citizenship.

Jackson v. Dines, 13, 90 (1889). In an action against a railroad company for damages for taking part of a mining claim, a complaint, showing plaintiff's possession and defendant's entry without permission and injury to the soil and timber, is sufficient. In such an action averment of citizenship by plaintiff is unnecessary, nor is he bound to show this fact unless its want is objected to by the defendant at such time and in such a way as to give him an opportunity to meet the objection.

Thomas v. Chisholm, 13, 105 (1889). A corporation organized under the laws of the United States, or of some State or Territory, may make a valid location of a mining claim, provided the members are all citizens of the United States, and severally qualified to make a location. In a proceeding on an adverse claim, a party basing his title upon a location by a corporation must allege and prove the organization of the corporation and the qualification of its members. *McKinley v. Wheeler* (*supra*) followed.

Lee v. Justice M. Co., 29 Pac. 1020 (1892). Where a location is invalid because the locator is an alien, it does not acquire validity by conveyance to a citizen. The conveyance here was without consideration, and collusive.¹

Bohanon v. Howe, 2, 417; 17 Pac. 583 (1888). In an Idaho. action for trespass upon mining ground where the legal title is in the United States, and the plaintiff's right is founded on a possessory title, he must allege and prove his citizenship.

Territory v. Lee, 2, 124 (1874). A mining claim, having been properly located, may be conveyed to and held by an alien, and the act of the territorial legislature "to provide for the forfeiture to the Territory of placer mines held by aliens," is unauthorized either by the act of Congress or by the Organic Act of the Territory.

Tibbitts v. Ah Tong, 4, 536 (1883). An alien cannot hold a mining claim purchased by him from the locator. Rev. Stats. 2319 opens the unappropriated mineral lands of the public domain to occupation and purchase by citizens only. An alien is thereunder incompetent to purchase those lands of the government. As location is the initial step to purchase, giving only a possessory title, which becomes complete upon the issuance of the patent, no one can hold a location who is incompetent to complete that title.²

Garfield M. & M. Co. v. Hammer, 6, 53 (1886), affirmed in 130 U. S. 291. The right to the possession of a mining claim is derived

¹ This case has been reversed on another point.

² *Manuel v. Wulff*, *supra*, to the contrary.

only from a valid location; consequently, if there be no location, there can be no possession under it. In an action to quiet title to a mining claim, where plaintiff's ownership and right of possession are put in issue, he must show affirmatively that he has complied fully with all the requirements of the act of Congress and the local rules and regulations relative to the location of mining claims, and has made, therefore, a valid location. An instruction to the contrary is not a prejudicial error, if the defendant did not introduce any evidence tending to invalidate plaintiff's location, but relied on an alleged forfeiture. In the absence of evidence, locators will be presumed to be citizens or to have declared their intention to become such.

Princeton M. Co. v. First Nat. Bank of Butte, 7, 530 (1888). A corporation may hold title to mineral land, though one of its stockholders (owning fifty-five per cent of the stock) be an alien, the corporation not having been the locator, but having acquired title subsequent to location.

Golden Fleece G. & S. M. Co. v. Cable Consolidated G. & Nevada S. M. Co., 12, 312 (1877). Where the first claimant who takes up a claim is not a citizen, or has forfeited his right by non-compliance with mining regulations, or abandons his claim, the ground is open to relocation by any citizen of the United States.

One of the five locators of a mining claim, title to which had passed into the defendant, on cross-examination testified that he was not a citizen, and had never declared his intention of becoming such, whereupon the court decided his location void, and excluded all evidence in regard to it. *Held*, error. Witness's admissions were not binding on his grantees, and his citizenship was a question for the jury to decide.

Where one of several locators is not a citizen, in the absence of knowledge of the fact on the part of his co-locators, the whole location is not void, but only the claim of the alien.

Sever v. Gregovich, 16, 325 (1881). A citizen and an alien made a joint location, and the alien subsequently was naturalized. After this the citizen relocated the same ground. He was held to be estopped from denying the rights of his original co-locator or of those deriving title from him.

Gorman M. Co. v. Alexander, 2, 557 (1892). A mining claim was located by citizens in 1877. In 1888 one of these conveyed his interest to an alien, who subsequently conveyed to plaintiff, a corporation competent to locate, acquire, and hold a mining claim. As against one seeking to locate the same ground subsequent to the last conveyance, plaintiff's title was good.

LAND OFFICE DECISIONS.

Where locators are not applicants, it will be presumed they were citizens, unless allegations to the contrary are made before patent issues. The objection comes too late after patent. *Wandering Boy*, Copp, 169 (1875).

A foreign corporation purchasing a patent issued to citizens of the United States, takes all the right and is entitled to all the privileges that would have accrued to the original patentees had they retained their interest in the mine. *Rev. Stats.* 2326; Copp, 177 (1875).

A portion of a mining claim sold to an alien cannot be patented while such owner is an alien; but on his declaration of intention to become a citizen, his right dates back to his purchase, and he may thereupon secure patent for his claim. *Copp*, 192 (1876).

An English corporation conveyed a claim to a citizen of the United States, in trust, that he might obtain a patent, and he agreed to reconvey upon securing the receiver's receipt. He had no further interest therein. He was held to be merely the agent of the corporation, which, incompetent to secure title by proceedings under the statute, could not accomplish that end by indirection by means of an agent. *Capricorn Placer*, 10 L. D. 641 (1890).

A citizen of the United States, acting in the interest of a foreign corporation, cannot make a mineral entry for the benefit of such corporation. *Hook v. Latham*, 11 L. D. 425 (1890).

A mineral entry made by an alien is not void but voidable, and while of record, the land covered thereby is segregated from the public domain. A protestant who makes a mineral location on land thus segregated acquires no interest thereby, as against the government or the entrymen, that will entitle him to be heard on appeal. *Leary v. Manuel*, 12 L. D. 345 (1891).

B. Other Qualifications of Locators.

The locators of a mining claim must be persons or associations of persons.

These may be women or minors. In the case of coal lands, however, minors cannot make entry.

California. *Thompson v. Spray*, 72, 528 (1887). Minors who are citizens may locate mining claims under Rev. Stats. 2319. The entryman of coal lands, however, under Rev. Stats. 2347 must be over twenty-one years of age.

LAND OFFICE DECISIONS.

A claim could not be located for the "Miners' Relief and Territorial Poor Fund," as it was neither a person nor an association of persons, was without legal existence, and powerless and incapacitated to "occupy and improve" a claim, or perform those acts of ownership or possession required of miners, as conditions essential to the holding of claims, or of proceeding to make payment to the government and obtain patent. *Terrible v. Gunboat*, *Copp*, 80 (1871).

Women may locate and hold mining claims. *Copp*, 221 (1877).¹

The fact that the locator of a mining claim is a minor does not render the location invalid. *Copp*, 266 (1880).

C. Location by Agent or Partner.

A mining claim may be located by one person for another. Such a location may be made either in the name of the agent or

¹ See *Boqart v. Daniels*, 18 L. D. 528.

of the principal. In the former case, if the relation of agency is established, the claim is held by the agent in trust for his principal, and a conveyance may be enforced. So also, when the partnership relation exists, the location is for the benefit of the partners, all of whom have an interest therein. But the relation must exist at the time of the discovery and location. Where the location is made by one in the name of another, either alone or jointly with his own, the interest of the absent locator is valid, provided he either previously authorized or subsequently ratified the location. The ratification of the location when made relates to the date of the location, and cuts out adverse intervening rights. When such location is made, the interest of the principal becomes vested, and the agent cannot by an act or declaration of his divest or alter that interest even before ratification, although the former had not yet acquired knowledge of the location.

The Statute of Frauds has no application to this class of cases. The evidences of location are not a means of transferring or vesting title, but a mode of showing that the locator has availed himself of the government's concession to occupy and use the land.

Where the agency is created for the purpose of exceeding the limit of ground which the principal may hold, a trust founded thereon will not be enforced.

United States. *Johnstone v. Robinson*, 16 Fed. 903 (1881), C. C. D. Colo. The partnership relation or association between parties who may be engaged in prosecuting explorations on the public lands for mines, must exist at the time of the alleged discovery and location, in order to give to the parties associated an interest in the property. If it does not then exist, *so that the person acting in the field, making the location and the discovery, can be said to be acting for the others as well as himself*, no interest can be acquired by those who are not personally present.

Fuller v. Harris, 29 Fed. 814 (1887), C. C. D. Alaska. At the time of the location of a quartz mining claim by the employees of the claimant, there were no local rules of the mining district requiring a record of the location. Subsequently the claim was relocated by the owner so as to conform to the requirements of the act of Congress. *Held*, that as there was a valid location of the claim by the employer through his employees, his title dated back to the first location.

One who was employed by another to prospect for and locate mining claims, in his receipt for wages received for such work, certified that his employer's claim was the first one located in the neighborhood, and therefore his employer procured laborers, and expended money

and labor in developing the mine. *Held*, that the employee was estopped from setting up a claim in himself.

Hunt v. Patchin, 35 Fed. 816 (1888), C. C. D. Nev. The owners in common of mining claims, owing to difficulty in raising money to pay the taxes and to do the labor required by statute, to prevent a forfeiture of the claims, after extensive correspondence between complainant, who was the principal owner, and defendant, who was manager of the mines, determined to allow a forfeiture, and let defendant immediately relocate the claims in new names. This he did on July 1, 1883, in his own name alone, after writing for advice to complainant, who prepared and sent him a form of notice in his name as locator. *Held*, that a trust attached to defendant's title in favor of his associates.

Book v. Justice M. Co., 58 Fed. 107 (1893), C. C. D. Nev. "When a location is made by one person in his own name, at the expense of, for the benefit and on behalf of another person, such other person is certainly entitled to the ground so located," and is entitled to the benefit of work done thereon by the locator. There is no law prohibiting a corporation formed under the laws of another State from acquiring a mining claim in this way.

An agreement to locate a mining claim for the benefit of another need not be in writing. The Statute of Frauds has no application.

Arizona. Rush v. French, 1, 99 (1874). L. and F., who had been prospecting together, parted company with an agreement that if either made a discovery he would locate the other with him. F. then furnished M. supplies to enable him to prospect, and M. making a discovery, located for himself and others, including L. Then at F.'s request M. made a further location on the same lode in L.'s name.

In ejectment by a subsequent locator, it was error for the court to refuse to charge that the subsequent ratification by L. of the location gave it the same effect as if made by himself, and to qualify this by adding, "unless a valid location by some other person had, in the interval between the location and ratification, been made and forfeited."

When a location is made for an absent locator, whether with or without his authority or knowledge, whatever rights are given to him by such location vest in him at once, and can only be divested by his own acts or omissions, or by operation of law. It is not necessary that authority should exist or ratification take place before other valid claims intervene.

The Statute of Frauds has no application to this case. "This writing is to be signed by the party creating the estate, or by some one having written authority to do so. The party who locates a mine obtains an estate therein by such an act, but it is not he who creates that estate."

A location made by one in the name of another, with the purpose of having the latter convey to him without consideration the whole or a part of said claim, the former having already located in his own name all the ground that he lawfully could, is not void where the latter did not know of the purpose of the location. Whether it would be void under other circumstances not decided.

California. *Gore v. McBrayer*, 18, 582 (1861). G., M., and nine others verbally agreed to prospect for quartz, and to be equally interested in the claims taken up. M. discovered a lead, and located it by putting up a written notice with his own, G.'s, and others' names on it. This process was the usual mode recognized among miners to indicate the taking up of a claim of this sort, as, in fact, an appropriation or proof of appropriation of the claim. G. thus acquired a right to his share of the claim, which right could not be divested by M.'s taking down the notice on the following day and putting up another which did not contain G.'s name. The Statute of Frauds has no application to this class of cases. It is not a mode of vesting or transferring title from the owners of the fee or the holder of the title, but a mere mode of showing that the locator has availed himself of the government's concession of the privilege of occupying and using the ground. This right may be exercised through an agent or servant; whenever the appropriation is made by an agent having authority from a principal to make it, the act is complete and the title vests in the principal, and the agent by his mere act cannot subsequently divest it.

Morton v. Solambo Copper Mining Co., 26, 527 (1864). If a mining custom allows a person to locate a vein or lode for himself and others, by placing thereon a notice, with his own name and the names of those whom he may choose to associate with him appended thereto, designating the extent of the claim, and one person thus locates a lode for himself and others, some of whom have no knowledge of the location, these latter become tenants in common with the locator and the others, and cannot be divested of their interest by the locator's afterwards tearing down the notice and posting another omitting their names, unless this is done with their knowledge and assent.

Thompson v. Spray, 72, 528 (1887). Mining claims may be located by agent. Where there is a local custom to that effect, it is not necessary that the person in whose name a location is made should be aware that it has been made. In the absence of such custom, there must be authority in the first instance, or ratification. Bringing of suit to quiet title is such ratification.

Moritz v. Lavelle, 77, 10 (1888). An agreement to locate and develop a mining claim for the joint benefit of the parties need not be in writing. If in pursuance of such an agreement one of the parties locates the claim in his own name, he is a trustee for the others to the extent of their interest, and they are entitled to enforce conveyance to them.

Mitchell v. Cline, 84, 409 (1890). A contract between several persons to locate for their joint benefit an amount of placer mining ground exceeding the limit of twenty acres for each individual, and to pretend to satisfy the law by using the names of additional locators who would, without consideration, convey their interests to the contracting parties jointly, is against public policy, and a court of equity will not enforce a trust founded on this contract in favor of one of the contracting parties against another of them who has procured a conveyance to himself individually from one of the sham locators.

Moore v. Hamerstag, 109, 122 (1895). A mining claim is real estate, and under the Statute of Frauds can only be transferred by operation of law or an instrument in writing.

The location of a mining claim may be made in the name of another than the actual locator, and when so made the person in whose name it is made becomes vested with the legal title to the claim; and where at the time there was no fiduciary relation between them, and it was not made under any prior agreement to hold the claim in trust for the actual locator, a subsequent parol promise to so hold it is void.

Consolidated Republican Mountain M. Co. v. Lebanon Colorado.

M. Co., 9, 343 (1886). One who acted as the agent of another in perfecting title to a lode, having himself no interest therein, is not estopped after his agency ceased from conveying any other or different title which he *thereafter* acquired to the premises in controversy.

Kramer v. Settle, 1, 485 (1873). If one of several co-locators of a mining claim caused notice of location to be recorded in the name of himself and others, in the absence of proof it will be presumed that the written consent of such others, as required by section five of the act in relation to mines, had been seen, and a minute made thereof by the recorder, before recording the notice.

Lockhart v. Rollins, 2, 503; 21 Pac. 413 (1889). One who holds a fiduciary relation as agent for the care, supervision, and sale of a mining claim cannot obtain an interest adverse to his principal by relocating the claim in his own name. The relocation accrues to the benefit of the principal.

Hirbour v. Reeding, 3, 15 (1877). A., B., and C. entered into a verbal contract of partnership to prospect for, locate, record, pre-empt, develop, and mine quartz lodes in Montana Territory, each to have the same interest in the property. The S. G. lode was discovered by them, but recorded by B. and C. in their names. All three worked upon and developed the ground. Afterward D. located a part of the same ground under the name of B. lode, but the conflict was settled by a conveyance by D. to B. and C. *Held*, the contract between A., B., and C. was not within the Statute of Frauds, and A. was entitled to an interest in the ground, which he could enforce, and which was not impaired by the conveyance by D. to B. and C.

Van Valkenburg v. Huff, 1, 142 (1865). A. in making his location used C.'s name without the latter's knowledge. By so doing he put himself in the place of servant or agent of C., and acquired no right which he could assert in himself. He could only acquire such right by abandoning the first location and relocating in his own name, in which case his right would date from this latter location.

Chase v. Savage Silver Mining Co., 2, 9 (1866). A. and B. located a mining claim in the name of themselves and four others, then they drew up a contract with prospectors, intended to be executed by all the parties, but which was signed by A. and B. only. *Held*, one of the other associates could ratify the location without becoming bound by the contract. A. and B. did not profess to act as his agent in making the contract, and there was no agency to be ratified.

Welland v. Huber, 8, 203 (1873). Where one located mining ground in his own name, either acting as agent for another or in pursuance of a partnership with another, by which he agreed to prospect and locate mining claims for their joint benefit, he did so under an implied

promise to convey to that other his interest upon request. The latter at once acquired a right to specific performance, which he might enforce without previous request. H., W., G., and K. entered into a partnership, by which it was agreed that the last three should furnish the means, and H. should prospect for and make location of a lode, in which all should be equally interested. H. located one thousand feet of mining ground, — four hundred in his own name and two hundred in the name of each of the others. W., G., and K. each conveyed two hundred feet to H., and subsequently declared that they had sold out their interests in the mine to H. This did not constitute a conveyance of their interest in the four hundred feet which was located in H.'s name, and was no defence to an action for a conveyance thereof.

CHAPTER VII.

DISCOVERY AND LOCATION OF CLAIMS.

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| <ul style="list-style-type: none"> I. Discovery of Ore. II. Length of Time allowed after Discovery to perform Acts of Location. III. Location of Claims. <ul style="list-style-type: none"> A. Marking the Location on the Ground. B. Notice of Location; Posting of Notice. | <ul style="list-style-type: none"> C. Record of Location Certificate. <ul style="list-style-type: none"> (a.) Its Nature and Necessity. (b.) Contents of the Record. (c.) Verification of the Certificate. (d.) Amendment of the Record. Additional Certificates. (e.) Mistakes in the Record. (f.) Requirements as to the Time and Place of recording Certificate. |
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I. DISCOVERY OF ORE.

"DISCOVERY and appropriation are the sources of title to mining claims, and development by working is the condition of their continued possession." Discovery is the first step in the location of the claim, or, more exactly, it is the precedent requisite to the location of a lode claim. The provision of the Rev. Stats. 2320 is: "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." No right can be acquired by location before discovery. It has been held that this rule does not apply in the case of placer claims which may be located without previous discovery of mineral.¹

This decision, however, is not recognized in the Land Office, where it is held that discovery is as much a prerequisite of a placer location as of a lode location.²

Discovery in the case of lode claims may be defined as being the finding of ore or metalliferous rock *in place* in a defined vein or in continuous vein matter upon unappropriated land of the public domain. The finding of float or detached pieces of ore will not be considered sufficient discovery upon which to base a

¹ *Gregory v. Pershbaker*, 73 Cal. 109.

v. Murray, 22 L. D. 409. And see *Idaho*,

² *Royal K. Placer*, 13 L. D. 86; *Ferrell* Act March 5, 1895, sec. 11, p. 26.
v. Hoge, 18 L. D. 81; 19 L. D. 568; *Reins*

location. It must be of ore *in place*; but on the other hand it has been very properly held that the lode or vein discovered need not contain "pay" ore. It is sufficient if it contain even a trace of ore, if the rock in place is sufficiently encouraging to warrant an ordinarily prudent person spending his time or money upon it.¹ Expert evidence is admissible to show that the vein is such as a miner would be likely to follow with the expectation of finding paying ore.

Having made such a discovery, the discoverer is entitled to make a location upon it in order to preserve to himself the fruits of his discovery. But a discovery, though made by several persons, cannot be made the basis of the location of more than one claim. Discovery made subsequent to acts of location does not validate such acts, unless no adverse rights have intervened.

The discovery must be within the limits of the claim located. There is a *dictum* of Justice Field in *Erhart v. Boaro* that a discovery outside the limits of the claim, provided its proximity and character are such as to justify a reasonable belief that the lode extends within the limits of the claim, entitles the discoverer to hold the land while completing his excavations to determine this fact and perform the necessary acts of location. Indeed, it has also been decided that the prospector can hold to the extent of his claim, if he remains in actual possession while he is prosecuting a search for mineral before the discovery of the same *in place*; but if he stand by and permit another to sink a shaft, or otherwise search for mineral within his boundary, and the latter first discovers the mineral, a location by the latter will take precedence over his claim.

It follows that when there is a dispute between locators as to territory which both claim; priority of proper location, based upon discovery of mineral in place, will take precedence; or even in the case when both have located it, but neither has found mineral in the territory in dispute, it will be awarded to him who first finds it in place in the vein. It is true with regard to either of these propositions that it matters not where the mineral is found, whether outcropping or in a shaft, provided it extends

¹ While the statements in the text are true as against subsequent locators, it is questionable whether they are as against agricultural claimants. In such a contest the test of the mineral character of the land is whether it can be mined profitably or not. See further, Chap. XIV., Div. I, G., and Chap. XV., Div. I.

to the ground in dispute. A prior discovery in the shaft on the dip of the vein or the downward continuance beneath the surface will confer a better title to the disputed territory than the subsequent discovery of the outcrop or apex of the vein within the boundaries of the same claim; but this is not true if the discovery shaft in question is upon another location, *for the top or apex of a vein must be within the boundaries of the claim in order to enable the locator to perfect his location.* The lode is the principal thing; the surface ground is incident thereto.

A discovery upon land already located will avail nothing. Such land is, of course, not unappropriated, and consequently not open to location. It is otherwise if the prior location is not a valid one. All that the law of the United States requires is the discovery of a vein or lode within the limits of the claim. This alone is sufficient. But the laws of the States and Territories may require something else to perfect a discovery (Rev. Stats. 2824). In many States, accordingly, before the discoverer of ore may locate his claim, he must sink a discovery shaft of a certain depth, or such tunnel, adit, or open cut as is defined to be the equivalent of such a shaft.¹

The course recommended by the Land Office is that the claimant should, "prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface." L. O. Regulations, par. 14.

United States. North Noonday Mining Co. v. Orient Mining Co., 1 Fed. 522 (1880), C. C. D. Cal. No rights can be acquired under the statute by location before the discovery of a vein or lode within the limits of the claim located.

Zollars v. Evans, 5 Fed. 172 (1880), C. C. D. Colo. The sinking of a shaft outside of the ground in dispute, and running drifts thence

¹ Arizona, Act March 20, 1895, secs. 3611; New Mexico, Comp. Laws 1894, sec. 3, 5, p. 53; Colorado, M. A. S., secs 3152, 1571; Act Feb. 5, 1889, p. 42; North Dakota, Comp. L. 1887, ch. 19, art. 1480-2; Wyoming, Laws 1898, ch. 40, secs 17 and 18, 1, secs. 2001, 2003; Idaho, Act March 8, 1895, sec. 3; Minnesota Gen. Stats. 1894, amended by act of Jan. 9, 1891, sec. 2, ch. sec. 4067; Montana, Pol. Code 1895, sec. 44, sec. 2.

to the ground in dispute, will not avail the plaintiff in ejectment, unless he can further show the discovery of a lode in such shaft, with the extension of the lode to the ground in dispute.

Crossman v. Pendery, 2 McCrary, 139; s. c. 8 Fed. 693 (1881), C. C. D. Colo. The prospector upon the public domain can hold to the extent of his claim in actual possession prior to the discovery of mineral in place, but if he stand by and permit another to sink a shaft within his boundary, and the latter first discovers mineral, the claim of the latter will be the better claim.

Van Zandt v. Argentine Mining Co., 8 Fed. 725, C. C. D. Colo. (1881). As between two locators, the boundaries of whose respective claims include common territory, priority of location confers the better title, provided a vein in place was discovered in the discovery shaft, and provided, also, that it extended to the ground in controversy.

Nor are the rights of the parties changed by the fact that the senior location was on the dip of the lode, the junior on the top or apex. To establish a location it is necessary to show not only that ore was found in the discovery shaft, but also that it is not broken and fragmentary, but a vein or lode, and that it extends to the ground in controversy. If nothing is found in the discovery shaft, the discovery of a body of ore elsewhere in the claim will not avail.¹

Jupiter Min. Co. v. Bodie Consol. Min. Co., 11 Fed. 666 (1881) C. C. D. Cal. No right can be acquired under the statute by location before the discovery of a vein or lode within the limits of the claim located.

Little Pittsburgh Con. M. Co. v. Amie M. Co., 17 Fed. 57 (1888). A location of a mining claim cannot be made by sinking a discovery shaft upon another claim which has been previously located, and which is a valid location.

Cheesman v. Shreeve, 40 Fed. 787 (1889), C. C. D. Colo. It is requisite to a valid location, and to the ownership of the title to a valid lode mining claim, that there should be discovery of ore, gold, or silver-bearing mineral in rock in place showing a well defined crevice and a discovery shaft at least ten feet deep from the lowest rim thereof, which discovery of mineral must be at the point claimed and designated, or made the point of discovery by the locators of said claim, and so designated in the location certificate relied upon by them in the working of said location.

Larkin v. Upton, 144, 19 (1892), affirming s. c. 7 Mont. 449. The top or apex of a vein must be within the boundaries of the claim in order to enable the locator to perfect his location and obtain title; but the apex is not necessarily a point, but often a line of great length. Any portion of the apex on the course or strike of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title; for while the owner of a vein may follow it in its descent into another's territory beyond his own side lines, he cannot beyond his own end lines, and the vein beyond those end lines is subject to further discovery and appropriation.

¹ This statement, of course, is confined to discovery shafts. See *Wight v. Taber*, 2 L. in its application to those States which have statutes requiring the sinking of dis-

Waterloo Min. Co. v. Doe, 56 Fed. 685 (1893), C. C. D. Cal. The use of an unclaimed piece of ground by a mining company for buildings, and for the construction of a tunnel thereunder to aid in the working of the company's claim, does not initiate any right to the ground as an independent mining claim.

The fact that three tons of silver-bearing rock yielding \$600 have been extracted from a mining claim does not entitle the locator to enter the claim for a patent when no vein or lode has been discovered within the limits of the claim, the location having been made merely in the hope of finding such at some future time.

Book v. Justice M. Co., 58 Fed. 106 (1893), C. C. D. Nev. The statutes should be so construed as to protect locators of claims who have discovered rock in place, bearing any of the precious metals named therein in sufficient quantity to induce them to expend their time and money in prospecting and developing the ground located. When the locator finds the rock in place containing mineral, he has made a discovery within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place as distinguished from float rock that constitutes the discovery, and warrants a location of a mining claim.

California. Gregory v. Pershbaker, 73, 109 (1887). The actual discovery of minerals before location is not essential to the validity of the location of a placer claim.

Colorado. Wolfley v. Lebanon M. Co. of N. Y., 4, 112 (1878). The central idea of a mining location is that there must be a discovered lode within it, the locus of which on its onward course or strike is embraced by the boundaries of the claim. The surface ground and the lode are not independent grants. It is not the purpose of the act to grant surface ground without a discovered lode. The lode is the principal thing, and the surface ground incident thereto.

Gray v. Truby, 6, 278 (1882). By sec. 7, Gen. Laws, p. 630, an open cut, a cross cut, a tunnel, and an adit are each made the equivalent of a discovery shaft. While it is expressly provided that the first three shall cut the lode at the depth of ten feet below the surface, there is no such requirement in the case of an adit.

"Our view is that while there is no express requirement of depth, the development must always be such in its dimensions and character as to make fairly the equivalent of a discovery shaft, and bring it substantially within the meaning of the term 'adit,' which Mr. Webster defines as being 'an entrance or passage, a term in mining used to denote the opening by which a mine is entered, or by which water and ores are carried away: called also a drift.'"

Armstrong v. Lower, 6, 393 (1882). The locator must sink his discovery shaft upon territory which he has a right to appropriate. If he sink it upon ground embraced in a prior, valid, and subsisting location, though with the consent of the owners thereof, he is in no better position than if he had not sunk the shaft.

Electro Magnetic M. & D. Co. v. Van Auken, 9, 204 (1886). In sec. 7, Gen. Laws, p. 630, an adit, as to the ten feet requirement, may be either open or under cover, or open in part and under cover in part, depending upon the nature of the ground. Every adit upon a hillside,

If continued, must enter cover at some distance from the point where excavation begins, the distance depending on the inclination of the surface. Supposing the lode to outcrop, the point where the excavation enters cover and the point where the lode is discovered, would never concur, except where the ground presented a perpendicular face. The latter point, not the former, is the point from which the development is to be measured.

Pelican & Dives M. Co. v. Snodgrass, 9, 339 (1886). One who makes a discovery of mineral, and runs a tunnel thereon, and does no other act towards completing the statutory location, and for four years does not labor thereon, acquires no interest therein as against intervening rights. Nor can he after the four years perform the remaining acts necessary to a statutory location, and have them relate back to the original discovery, there being intervening rights.

The party who first discovers a vein and posts his discovery notice, following such acts with the remaining acts necessary to a valid location within the time prescribed by law, is entitled to the vein as against a subsequent discoverer who succeeds in first completing all the requisite acts of location.

Craig v. Thompson, 10, 517 (1887). Where a discovery cut is along the vein, the statutory requirement as to depth of adits applies, and not that as to open cuts.

McLaughlin v. Thompson, 29 Pac. 816 (1892). No interest can be acquired by sinking a shaft to the depth of ten feet and putting up stakes, unless mineral is discovered in the shaft. Such a location is absolutely worthless for any purpose.

Golden Terra Co. v. Smith, 2, 377 (1881). A vein is discovered when there is discovered a well defined lode of rock in place carrying gold, which lode subsequently proves continuous. The existence of a wall rock at the place of discovery is not necessary; nor is it necessary that the rock should contain pay ore. Per Dist. Ct.

This, it would seem, must have met the approval of the Supreme Court.

Burke v. McDonald, 33 Pac. 49 (1890). Beatty, C. J.: Idaho. "The practice of posting notices upon any ground within which the existence of a ledge may be imagined has become so common that the emphatic requirement of the law that a ledge discovery must initiate the location of a claim is nearly forgotten. The courts will insist upon and enforce this most important provision of the law whenever opportunity offers."

Montana. Foote v. National M. Co., 2, 402 (1876). "A lead or lode is not an imaginary line without dimensions; it is not a thing without shape or form, but before it can legally and rightfully be denominated a lead or lode it must have length and width and depth; it must be capable of measurement; it must occupy defined space, and be capable of identification. Before a quartz claim can be legally located, a lead or lode containing gold or silver must be discovered, and before such discovery can be called a discovery, at least one well defined wall or side to the lode must be found. What, then, is a quartz lode? It is a fissure or seam in the country rock filled with quartz matter bearing gold or silver. This fissure may be wide or narrow;

it varies in width from one inch or even less to one hundred feet or much more. The sides of a lead are represented and defined by the walls of the country rock; and these walls must be discovered and the lead identified thereby before it can be located and held as a lead."

Upton v. Larkin, 5, 600 (1885). A location of a mining claim void at the time it was made because of no discovery continues void, and is not cured or made effectual by a subsequent discovery, providing rights have accrued.

O'Donnell v. Glenn, 8, 248 (1888). A location is not invalid because the locator puts up a notice at the shaft, which contains no mineral, when he has discovered mineral at another point in the vein, which is covered by his location, the boundaries of which can be readily traced and the claim identified.

The law does not require a discovery shaft, but only a genuine discovery of a mineral-bearing vein, with at least one well defined well, and such a description of it in the declaratory statement of record as will identify it, and enable a person to easily trace its boundaries. Evidence of discovery outside the discovery shaft is, therefore, admissible in an action on an adverse claim.

Flick v. Gold Hill & Lee Mt. M. Co., 8, 298 (1889). The validity of Comp. Stats. 1889, sec. 1479, div. 5,¹ requiring a discovery of a vein or crevice of quartz or ore, with at least one well defined wall before recording notice of location, is doubtful, as conflicting with the Organic Act of the Territory by which the passage of an act interfering with the primary disposal of the soil is prohibited.

Shreve v. Copper Bell M. Co., 11, 309 (1891). A paying lode need not be discovered to entitle a locator to his claim. It is sufficient if the lode contain such indications of minerals that he is willing to spend his time and money in expectation of finding ore sufficiently valuable to work. By De Witt, J., dissenting on other questions.

McDonald v. Montana Wood Co., 14, 88 (1893). One discovery is sufficient to hold a placer location of one hundred and sixty acres by an association. It is not necessary to make a discovery on each tract of twenty acres.²

Davidson v. Bordeaux, 15, 245 (1894). A locator need not show that he made assays of the vein, when no one disputes the *prima facie* showing by the evidence of the prospector that the vein was a good one, and appeared to be sufficiently good to justify locating and working it.

McShane v. Kenkle, 44 Pac. 979 (1896). In order to constitute a valid discovery it is not necessary that the vein should contain mineral of such a nature that the practical miner would be justified in following it up and developing it. It is sufficient if it carries enough mineral to justify the locator in expending time and money in prospecting and developing.

The testimony of mining men is admissible in the determination of this fact.

It is not required that the paying mineral should be found at the time and place of discovery, if the development shows that it exists within the limits of the location.

¹ This section was not re-enacted in the Code of 1895.

² To the contrary, *Ferrell v. Hoge*, 19 L. D. 568.

Nevada. *Overman S. M. Co. v. Corcoran*, 15, 147 (1880). No valid location of a mining claim can be made until a vein or deposit of gold, silver, or metalliferous ore or rock *in place* has been discovered.

Southern Cross G. & S. M. Co. v. Europa M. Co., 15, 383 (1880). The results of assays of rock taken from a mining claim long after the date of its location are competent evidence to show that locators discovered a vein at the time of the location.

Utah. *Harrington v. Chambers*, 8, 94 (1881). The word "lode" in the act of Congress prescribing a discovery before location has the meaning given it by the miner; viz., "Whatever the miners could follow and find ore."

"I have long thought, and still think, that . . . a valid location of a mining claim may be made whenever the prospector has discovered such indication of mineral that he is willing to spend his time and money in following it in the expectation of finding ore, and that a valid location may be made of a ledge deep in the ground, and appearing on the surface, not in the shape of ore, but in vein matter only."

Expert testimony is admissible to show that a claim contained such a vein as a miner discovering it would be likely to follow with the reasonable expectation of finding paying ore.

Where the question of discovery is in dispute, testimony is admissible to show indications of ore or vein matter at other points on the surface of the claim than at the place marked "Discovery."

LAND OFFICE DECISIONS.

The act of Congress of Jan. 22, 1880, does not annul the provisions of the State law of Colorado, which requires a discovery shaft to be sunk within a certain number of days from date of discovery. *Copp*, 290 (1880).

It is not necessary that mineral be discovered in the discovery shaft if it is discovered within the limits of the claim before adverse rights attach. After entry, where there is no fraud, and in a question between the government and applicants only, if it becomes necessary in order to support the entry to find that applicants had mineral in their discovery shaft, it will be so found in all cases where the evidence is conflicting. *Wight v. Tabor*, 2 L. D. 738 (1884).

A location made after May 10, 1872, based on a discovery made within the limits of a claim properly located, and not abandoned or lost by failure to perform the labor thereon required by law, is an invalid location.

If such prior location is not a valid one, or if it was a valid one at its inception, and the locator has not performed the required amount of labor thereon, a discovery made within the boundaries thereof before work has been resumed thereon under the statute may become the basis of a legal location. It does not, therefore, necessarily follow that a discovery made within the boundaries of a prior location is not a valid location; that must be determined by first ascertaining the status of the original location at the time the second location was made. *Branagan v. Dulaney*, 2 L. D. 744 (1884).

Although prior to location no discovery of mineral was made within the ground claimed, upon a subsequent discovery prior to application for patent the location became good and sufficient, in the absence of any adverse rights. *Mitchell*, 2 L. D. 752 (1884).

Where it appears that discovery and improvements are upon adjoining or conflicting land already patented to others, application for patent will be denied. *Spur Lode*, 4 L. D. 160 (1885).

Patent will not issue on an application wherein the land upon which the discovery shaft and improvements are situated is expressly excepted therefrom, and the proof fails to show the discovery or existence of mineral on the claim as entered, or the requisite expenditure for the benefit thereof. *Antediluvian L. & M. Site*, 8 L. D. 602 (1889); *Lone Dane Lode*, 10 L. D. 53 (1890).

A discovery, though made by two persons, is but a single discovery, and but one location can be based upon it. It is not susceptible of subdivision for the purpose of two locations, having a common end line that bisects the discovery shaft. *Poplar Creek Con. Q. Mine*, 16 L. D. 1 (1893).

Discovery within the limits of a lode claim is a prerequisite to the location thereof. A properly corroborated protest alleging that there was no discovery is ground for a hearing, although the deputy surveyor's report shows the existence of ores in various parts of the claim. *Waterloo M. Co. v. Doe*, 17 L. D. 111 (1893).

Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met. *Castle v. Womble*, 19 L. D. 455 (1894).

There must be a discovery on each twenty acres in a placer claim of one hundred and sixty acres made by an association. *Ferrell v. Hoge*, 19 L. D. 568 (1894); *Louise Min. Co.*, 22 L. D. 663 (1896); *Union Oil Co.*, 23 L. D. 222 (1896).¹

An entry will not be allowed when the discovery is within the limits of a prior patented lode claim. *Edw. W. Williams*, 20 L. D. 458 (1895); *Winter Lode*, 22 L. D. 362 (1896).

In a contest between mineral claimants, where one alleges that the claim of the other was not based on a valid discovery, the latter is not bound to show the existence of a valuable deposit of mineral. The government does not inquire into the value of mineral deposits except in contests between mineral and non-mineral claimants. *Tam v. Story*, 21 L. D. 440 (1895).

Discovery is a necessary prerequisite to the location of a placer claim. The fact that the land has been returned as mineral does not avoid this necessity. *Reins v. Murray*, 22 L. D. 489 (1896).

II. LENGTH OF TIME ALLOWED AFTER DISCOVERY TO PERFORM ACTS OF LOCATION.

A discovery being made, the discoverer is entitled to retain undisturbed possession for a reasonable length of time to com-

¹ To the contrary, *McDonald v. Montana Co.*, 14 Mont. 88.

plete the acts of location required by law. What length of time is allowed for this purpose is not fixed by the law of the United States, but is left to the law of the State or the regulations of the district. In the absence of such determination a reasonable time is allowed to the locator, and what this is depends upon the circumstances connected with the claim and affecting the locator's ability to define it. It may be stated broadly that he must not sleep upon his right, but must proceed with due diligence to develop his property.

A fixed time is prescribed in many States.¹ The locator's possession during this time must be undisturbed. One who by force or threats prevents the performance of the acts of location during the statutory period will not be allowed to take advantage of the locator's failure.

United States. Erhardt v. Boaro, 113, 527 (1884). Field, J.: "Whenever preliminary work is required to define and describe the claim located, the *first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made so as to disclose whether a vein or deposit of such richness exists as to justify work to extract the metal.* Otherwise the whole purpose of allowing the free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle for possession, instead of previous discovery, would determine the rights of the claimants. . . . And the laws of the United States do not prescribe any time in which the excavations necessary to enable the locator to prepare and record a certificate shall be made. That is left to the legislation of the State (Colorado), which prescribed sixty days for the excavations upon the vein from the date of recovery, and thirty days afterward for the preparation of the certificate and filing it for record. In the judgment of the legislature of that State this was reasonable time. This allowance of time for the development of the character of the lode or vein does not, as intimated by counsel, give encouragement to mere speculative locations, that is, to locations made without any discovery or knowledge of the existence of metal in the ground claimed, with a view to obtain the benefit of a possible discovery of metal by others within that time.

"A mere posting of a notice on a ridge of rocks cropping out of the earth or on other ground, that the poster has located thereon a mining claim, without any discovery or knowledge on his part of the

¹ Sixty days in Colorado, M. A. S., sec. 3155; N. Dakota, Rev. Codes 1895, sec. 1433; S. Dakota, Comp. L. 1887, ch. 19, art. 1, sec. 2,004; Wyoming, Act Feb. 21, 1895, p. 247; Ninety days in Arizona, Act March 20, 1895, sec. 6, p. 53; Montana Pol. Code, 1895, secs. 3611-2; New Mexico, Act Feb. 5, 1889, p. 42; Three months in Minnesota, Gen. Stats. 1894, sec. 4067; Three days to mark boundaries, sixty days to sink shaft, and ninety days to record certificate in Idaho, Act March 20, 1895, secs. 2-4, p. 26.

existence of metal there, or in its immediate vicinity, would be justly treated as a mere speculative proceeding, and would not itself initiate any right. There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence. Then protection will be afforded to the locator to make the necessary excavations, and prepare the proper certificate for record.

"It would be difficult to lay down any rules by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, so as to determine whether it will justify the expenditures required to extract the metal; but a jury from the vicinity of the claim will seldom err in their conclusions on the subject."

Doe v. Waterloo M. Co., 70 Fed. 455 (1895), C. C. Ap., 9th Circ., affirming s. c. 55 Fed. 11. N. discovered a metal-bearing lode, and on the same day erected a monument and posted thereon a written notice: "I have this day located and claimed fifteen hundred feet on this lead or lode running one thousand feet northwesterly and five hundred feet southeasterly, with three hundred feet on each side for mining purposes. I also claim the legal time of twenty days to complete my boundary monuments." Eleven days thereafter W. and Y. located and set up the boundary monuments of a conflicting claim, and while doing so saw N.'s notice, but did not take the trouble to go and read it. Subsequently, but before the expiration of the twenty days, the transferees of part of N.'s interest (he being prevented by illness) marked the location on the ground and set up boundary monuments. The location of W. and Y. was invalid.

The discoverer of a vein is entitled to a reasonable time within which to complete his location. What is a reasonable time depends upon the circumstances affecting the ability of the locator to properly define his claim. His illness is not one of these circumstances. They are such as pertain to the ground to be located, its character, the means of properly working the ground, and the ability to properly ascertain the dimensions and course or strike of the vein. In this case, where the ground was upon a rough mountain side, the vein was exposed for four hundred feet in one place and forty in another and for the rest of its length covered, and the dip was not exposed; twenty days was not unreasonable.

Patterson v. Hitchcock, 3, 533 (1877). The discoverer of a lode, by virtue of that discovery becomes entitled to a reasonable length of time in which to perfect the work required by law, and for that time he is permitted to retain possession of the property without interference; and the law protects him in his possession while the work of development goes on as well as after the development is completed, but in the meantime his work must progress with reasonable diligence. What is to be regarded as a reasonable time to occupy in sinking a discovery shaft in the manner and to the depth required by law is, when the facts are undisputed, a question of law. But when the question is submitted to the jury with the instruction that ninety

days is not a reasonable time, he against whom the verdict is found cannot complain if the jury determine that less than ninety days (eighty-five days) was a reasonable time. The discovery was made in this case before the act of Feb. 13, 1874, went into effect.

Miller v. Taylor, 6, 41 (1881). In an action for restitution of mining property, the plaintiffs alleged that they have been ousted of their possession before the expiration of the time within which they had to comply with the statutory requirements of marking, locating, and recording their claims, and that they were prevented by the threats of the defendants from complying with these requirements. A demurrer on the ground that the plaintiffs in their complaint did not show a compliance with the statutory requirements was overruled. One who prevents a thing's being done may not avail himself of the non-performance.

Omar v. Soper, 11, 380 (1888). The object of the statute in giving sixty days for sinking the discovery shaft was evidently to afford the miner time to sink his shaft, and to ascertain the true course of his lode, when he would be qualified to mark its boundaries on the surface. During this period, if notice is posted, which in addition to the statutory requirements specifies the extent of territory claimed along the vein on both sides of the point of discovery, a claim is protected throughout its whole extent from invasion and adverse claims. No one can lawfully enter upon it during the period for the purpose of initiating a claim, nor can any one in any manner initiate a claim thereto capable of being rendered valid in the future by the happening of fortuitous circumstances; as by sinking a discovery shaft, and locating another claim which overlaps the first.

Burke v. McDonald, 38 Pac. 49 (1890). Beatty, C. J.: Idaho. "The law does in its liberality allow the prospector after the discovery of his vein a reasonable time in which to develop its course, and then mark accordingly the boundaries of his claim; but it does not permit him, after having posted his notice, to leave his claim incomplete, and going in quest of other claims post his notice here and there over the country, to the exclusion of other prospectors, and at his leisure prospect and mark out his claims. While no hardship or unusual exertion is required of him, good faith and reasonable diligence are." If after posting notice a discoverer leaves for four days, during which time he posts fifteen other claims, his rights will not be protected against intervening locators.

Gleeson v. Martin White M. Co., 13, 442 (1878). Nevada. "A location on a vein must be made by taking up a piece of land to include it. No other means are provided, and it is only upon condition of complying with the law that the locator becomes entitled to do anything. The discoverer of a vein may be allowed a reasonable time to trace its course before being compelled to define his surface claim, and in the meantime may be protected in his claim to fifteen hundred feet of the vein, but his location will never be complete until his surface claim is defined."

In the absence of State or local regulation of the time to be allowed for tracing the boundaries, a reasonable time, to be determined from the circumstances of each case, will be allowed.

Oregon. *Patterson v. Tarbell*, 26, 29 (1894). · Bean, J.: “The discoverer of a lode or vein of rock in place bearing precious metals, in the absence of some local rule of miners or legislative regulation allowing some time for exploration, must immediately locate his claim by distinctly marking the same on the ground, so that its boundaries can be readily ascertained, in order to hold it against a subsequent valid location peaceably made.”

Defendant made discovery, and instead of marking his location, merely posted a notice and continued his explorations for the purpose of determining the course of the lode. After a few days he left the ground for a short time to obtain a surveyor, and in his absence plaintiffs entered and marked a location which took in part of the ground claimed by defendant. The plaintiffs' location was held to be good.

“A discoverer of a vein or lode who proceeds diligently, in good faith, to complete his location by marking its boundaries on the ground and otherwise complying with the law, will no doubt be protected in his rights as against a subsequent locator of the same ground; but no claim is made in this case that defendants did not have ample time and opportunity after their discovery and before plaintiffs' location in which to complete their location by marking the boundaries of the claim on the ground and posting the notice required by the statute. Their contention is that they were entitled to a reasonable time after the discovery in which to continue their explorations and trace the course or strike of the vein or lode. As there are no local rules or regulations governing this matter, and the act of Congress is silent on the subject, the question, it seems to us, depends upon whether mere possession and exploration are sufficient to give to the discoverer a right to hold a mining claim against one who peaceably enters and makes a valid location.” Discovery and appropriation are both conditions precedent to the right to occupy, and all the acts of location, one of which is the marking on the ground, must be complete before there is a right of possession as against the United States or its grantee.

South Dakota. *Marshall v. Harney Peak T. M. M. & M. Co.*, 1, 350 (1890). Plaintiffs made discovery on July 31, 1884, and on the same day posted a notice giving the dimensions and directions of the claim. They did nothing more until Sept. 21, 1884, when they marked the location, and on September 28 recorded their location certificate. Defendant made an alleged location of part of this claim on Sept. 19, 1884.

By Compiled Laws, secs. 1999, 2001, 2003, 2004, plaintiff had sixty days from the date of discovery in which to perform the acts of location prior to the record. The acts of the plaintiff on July 31 constituted a valid appropriation which withdrew the claim from location by others for sixty days and during that time vested the possession in the plaintiff.

III. LOCATION OF CLAIMS.

A discovery having been made, the ground is open to location as a mining claim, that is, in the language of Rev. Stats. 2319, to occupation under regulations prescribed by law and according to the local customs or rules.

Location consists of the performance of certain acts which were commonly recognized by the customary law to be requisite and sufficient to establish a valid possessory title. The manner of location is by the law of the United States referred to the regulations, not in conflict with the laws of the United States, made by the miners of each mining district, subject, however, to certain requirements as to marking the claim and the contents of the record. The former being the only step in the location for which the laws of the United States, unaided by State or local legislation, lay down a rule, will be first discussed. The other steps in the location are the posting of notice, the filing and recording of a certificate, which are not made essential by acts of Congress, but are generally required by the laws of the States and Territories or by the district regulations.

A. *Marking the Location on the Ground.*

The provision of Rev. Stats. 2324 is as follows: "The location must be distinctly marked on the ground, so that its boundaries can be readily traced." This does not necessitate the marking of the boundaries. It is the location that must be marked, that is, designated by some means, so that any one visiting the ground and honestly endeavoring to do so can readily trace the boundaries of the location already made. All the act of Congress intends, is that a person seeking to make a subsequent location may be able to do this. This is the test. It follows, of course, that it is incumbent upon the locator to keep up his artificial boundary posts or monuments after they have been made; but after, by the performance of all the necessary acts of location, the full possessory title has vested in the locator, his right cannot be divested by the obliteration or removal of his marks without his fault; and proper marking will be presumed from its recital in the recorded location notice. And after the

lapse of a long time, during which marks or boundaries may reasonably have become defaced or obliterated, every presumption will be made in favor of the validity of the location.

The failure, however, to mark the location as required is absolutely fatal to its validity. The designation must be made by distinct marks upon the ground. A posted notice defining boundaries is not a mark on the ground. The law of the United States does not define what kind of marks shall be made or where they shall be placed. Whether the marks are such that the boundaries may be readily traced is a question of fact to be determined by the jury from the circumstances of each case, particularly the nature of the ground. This question, however, may be determined by legislation by the State or the regulations of the miners, who may specify the nature, kind, and number of marks or monuments that the locator must erect to establish his location. In some of the States there are statutory requirements that the marking shall be by posts, or stakes, or monuments of rock, and the nature, size, and position of those are generally defined in detail.¹ In Colorado,² Montana,³ and New Mexico,⁴ the removing of such stakes is a misdemeanor.

The Land Department recommends that the claimant "should drive a post or erect a monument of stones at each corner of his surface ground." L. O. Regs., par. 15.

Difficulty of access does not excuse failure to set proper stakes. But where a part of the ground is inaccessible, the validity of the location is not affected by failure to mark the location, provided the accessible part of the ground is so marked as to indicate to one honestly endeavoring to ascertain where the boundaries are.

A locator cannot, after location, change the lines of his claim so as to take in other ground, if his so doing will interfere with the previously accrued rights of others. But the validity of his location is unaffected by a slight variation between his lines as marked and a subsequent actual survey for a patent. If there is no conflict with the rights of others, he may even make a consid-

¹ Arizona, Act March 20, 1895, secs. 3 and 4, p. 53; Colorado, M. A. S., 3152, 3153; Dakota, Comp. L. 1887, ch. 19, art. 1, secs. 2001-2; Idaho, Rev. Stats. 1887, secs. 3100, 3101, 3121, amended by Act March 5, 1895, p. 26; Minn. Gen. Stats. 1891, secs. 3665-6; New Mexico, Act Feb. 5, 1889, secs. 2, p. 42; North Dakota, Rev. Codes 1895, secs. 1430-1; Wyoming, Laws 1888, ch. 40, sec. 17.
² M. A. S. 1423.
³ Comp. Stats. 1887, 5th div., sec. 1482.
⁴ Act Feb. 5, 1889, sec. 5, p. 42.

erable change, to conform his lines to the course of his vein as disclosed by exploration. In fixing the boundaries of placer claims, it should be remembered that they must conform to the legal subdivisions of the public lands, where these have been surveyed. Rev. Stats. 2329.

United States. North Noonday Mining Co. v. Orient Mining Co., 1 Fed. 522 (1880), C. C. D. Cal. A location of a mining claim must be distinctly marked on the ground, so that its boundaries can be readily traced; but the law does not prescribe or define what kind of marks shall be made, or upon what part of the ground or claim they shall be placed.

Any marking on the ground claimed by stakes, mounds, and written notices, whereby the boundaries can be readily traced, is sufficient. If the centre line of the location of a lode claim, lengthwise, be marked by a prominent stake or monument at each end thereof, upon one of which is placed a written notice showing that the locator claims the length of said line upon the lode, from stake to stake, and a specified number of feet in width on each side of said line, such location is so marked that the boundaries may be readily traced, and, so far as the location is concerned, is a sufficient compliance with the law.

Jupiter M. Co. v. Bodie Con. M. Co., 11 Fed. 677, 7 Sawy. 96 (1881), C. C. D. Cal. "To make a valid location under the statute, it is required that the 'location must be distinctly marked on the ground so that its boundaries can be readily traced;' but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed.

"Any marking on the ground claimed, by stakes and mounds, and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. But there must be some such marking, and when a mining claim is once sufficiently marked out upon the ground, and all other necessary acts of location are performed, it vests the right of possession in the locator, which right cannot be divested by the obliteration of the marks or removal of the stakes without the fault of the locator so long as he continues to perform the necessary work upon the ground and to comply with the law in other respects."

Cresus Mining Co. v. Colo. Land & Mineral Co., 19 Fed. 78 (1884), C. C. D. Colo. The statute of Colorado affords no support to one who, locating his claim, fails to set the proper stakes at the end of the claim, when the proper position for them was not inaccessible, but merely difficult of access, or approachable by a circuitous route. In such case the title will only relate to the time when the stakes are subsequently set.

The locator of a mining claim cannot, after the location, change the lines of his claim so as take in other ground when such change will interfere with the previously accrued rights of others.

Book v. Justice M. Co., 58 Fed. 107 (1893), C. C. D. Nev. In this case posts two by four inches and four feet high, driven into the ground, or held up by monuments of stone at the corners of the claims,

were held sufficient. "The question as to the sufficiency of the stakes and monuments to enable the location to be traced always depends to a great extent upon the conformation and condition of the ground located. A location on a hill covered by a dense forest might require more definite marking than a location on a bald mountain, where the stakes whenever seen could be readily seen." In the present instance the claim was on a comparatively barren hill, upon the surface of which the rock was exposed in many places, and small bunches of stunted sage bush were dotted.

When the right of possession once becomes vested, it cannot be divested by the removal or obliteration of the stakes or monuments without the locator's fault.

Gird v. California Oil Co., 60 Fed. 531 (1894), C. C. S. D. Cal. The local rules required boundary posts to be two feet high. The evidence showed that the locator was engaged in making his location long enough to have built his monuments to the proper height, but at the time of the trial, fourteen years afterwards, they were only seven or eight inches high. It was held that the court was justified in finding that as originally constructed they answered the requirements of the local rules.

Arizona. *Jantzen v. Ariz. Copper Co.*, 20 Pac. 93 (1889). Where there is a recorded notice reciting posting and marking on the ground, it will be presumed that these things were done.

California. *English v. Johnson*, 17, 107 (1860). Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on a part, and though the party does not enter in accordance with mining rules or under a paper title. The rule which applies to agricultural lands does not apply to such a case. Fences are not required around mining claims. The physical marks upon and around the claim are sufficient to notify every one of the possession and claim of the possessor; and by common understanding the going upon a claim to work it is not an appropriation of the entire claim, especially if the claim can be appropriated to that extent by the location of one man.

Holland v. Mt. Auburn G. Q. M. Co., 53, 149 (1878). The posting of a notice upon a tree at each end of a mining claim is not a sufficient compliance with Rev. Stats. 2324, which requires the location to be "distinctly marked on the ground, so that its boundaries can be readily traced."

Gelcich v. Moriarty, 53, 217 (1878). Parties locating mining claims after May 10, 1872, must do so in accordance with the requirements of the act of Congress of that date. Placing a monument in the centre of a claim, and posting a notice thereon defining the claim, is not a compliance with the act, which requires locators to mark distinctly their locations on the ground so that the boundaries can be readily traced.

Newbill v. Thurston, 65, 419 (1884). Merely erecting a discovery monument and posting thereon a notice claiming a certain number of feet along the ledge in both directions is not a valid location of a mining claim under the act of Congress. Nor can the locator by

claiming in his notice a certain time within which to run his boundaries prevent location by others within that time.

The act of Congress does not state any time within which the location must be completed; but it says that the claim must be distinctly marked on the ground so that its boundaries can be readily traced. "If a person be on the ground actually engaged in making the location, it would hardly be asserted that another might locate over him; but the case before us does not present such transactions."

Du Prat v. James, 65, 555 (1884). Whether the boundaries of a location are distinctly marked on the ground is a question of fact.

Taylor v. Middleton, 67, 556 (1885). The question whether the boundaries of a mining claim are so marked as to be readily traced is one of fact. It was error to charge the jury "that a monument of stone two feet high placed in the centre of the location, a notice of location placed thereon, and a similar monument of stone or a stake at the centre of each end of the location, and a similar monument or stake at each corner of the location, are a sufficient marking of a location on the ground, and constitutes a valid location of a mining claim." The question depends upon the condition of the ground.¹

Anderson v. Black, 70, 226 (1886). In an action to recover possession of a mining claim, the question whether plaintiff's location was so distinctly marked on the ground that the boundaries could be readily traced, is for the jury; and where there is evidence to that effect, the court should not instruct the jury that the omission to erect a monument at a certain corner of the claim would be fatal to the plaintiff's location.

Doe v. Tyler, 73, 21 (1887). The location of a mining claim, if otherwise sufficient, is not rendered invalid by reason of the fact that certain of the monuments erected to mark its boundaries were by mistake placed upon adjoining claims. In such a case the location is good in so far as the land included within the boundaries is vacant and subject to location.

Souter v. Maguire, 78, 543 (1889). Where the locator marked the corners of the end lines, placed a stake or blazed a tree at each corner of the claim, and in places brushed out the lines so that a person could get through, and placed a notice in the centre of the claim defining the boundaries, there is sufficient to justify a finding that he marked off the boundaries as required by act of Congress.

White v. Lee, 78, 593 (1889). In locating a placer claim by legal subdivisions on surveyed ground it is necessary to mark the lines of the location. It is not sufficient merely to post a notice referring to the legal subdivisions.

Anthony v. Jillson, 83, 296 (1890). Failure to mark the boundaries of the location is fatal to its validity, and the defect is not cured by the fact that the notice of location gave the section numbers constituting the claim.

Pollard v. Shively, 5, 309 (1880). The requirements of the acts of Congress as to marking the boundaries of mining claims were supplemented in Colorado by the act of 1874, M. A. S. 3153. Under this act, "if in the survey of a mining location a

¹ See, however, *North Noonday M. Co. v. Orient M. Co.*, 1 Fed. 522, ante.

stump of sufficient size and stability stands at a point where a statutory post should be located, I see no good reason why it should not be hewed, marked, and adopted as a location post. In such case, however, the descriptive survey should give both its real and assigned character." Where there was no variation between monuments and courses the failure to designate would be unimportant, but in case of variation it would be of prime importance. The claim being otherwise marked as required by statute, the failure to place the side posts in the centre of the side lines will not necessarily invalidate the location. The requirement is satisfied if they are placed substantially in the centre. Besides, such an omission might exist with all the corner posts properly placed and the lode exposed and worked its entire length. The statutory requirements are so far imperative as to require that the boundaries may be readily traced, and that the notice contemplated by them shall not be impaired by any omission.

Sweet v. Webber, 7, 443 (1884). The requirement as to marking the location on the ground is applicable to placer claims.

Becker v. Pugh, 9, 589 (1886). A requirement of miners' regulations that a claim be "staked off," means, it seems, that the boundaries, or at least the course of the vein, be marked with stakes. It is complied with by erecting one stake containing a notice.

Seymour v. Fisher, 16, 188 (1891). The law allows a change of boundaries when amended certificates are filed; and an injury to superior rights thereby is effectually waived by failure to adverse.

Becker v. Pugh, 17, 243 (1892). In an action on an adverse claim it was shown that, a vein of mineral-bearing quartz having been discovered in 1862, a notice was placed at the mouth of the shaft, and stakes at each end of the claim, on the vein; and that there were other stakes on the property, but by whom placed there, witness did not know. *Held*, that considering the length of time that had elapsed this was sufficient evidence of erection of stakes.

West Granite Mt. M. Co. v. Granite Mt. M. Co., 7, **Montana**, 356 (1888). The location of a mining claim is sufficiently marked within the requirements of Rev. Stats. 2324, by stakes set for corners of four neighboring claims. The act "does not mean that the marks shall be upon the actual ground included within the mining claim, but that they may be upon any ground adjoining near enough to readily designate the boundaries. . . . All that was intended is that a person seeking to make a subsequent location could go upon the ground referred to, and from the marks made find the boundaries of the claim."

Shreve v. Copper Bell M. Co., 11, 309 (1891). Where, after notices of location of L. and E., claims were filed, the owners of E. moved the stakes at one end so as to conflict with L. claim, and then conveyed by separate deeds their interest in the E. claim as described in the certificate of location, they were estopped from maintaining under a subsequent purchase of the L. claim that their deeds conveyed no part of the latter. It is customary and proper for locators, when by exploration they have ascertained the true course of their vein, to change their boundaries, and having done so and abandoned a portion of the original location to the public, it cannot be said to be their intention in convey-

ing the claim to sell, or the intention of the other party to buy, the original location.

Nevada. *Rogers v. Cooney*, 7, 213 (1872). In marking the boundaries of a mining claim fencing is not necessary.

Gleeson v. Martin White M. Co., 13, 442 (1878). "A location on a vein must be by taking up a piece of land to include it. No other means are provided, and it is only upon condition of complying with the law that the locator became entitled to do anything. The old customary method of locating a lode by means of a notice posted on the cropping, and of holding it by record of the notice and work done at the discovery point, is *completely replaced by the acts of Congress.*"

The law does not require the marking of the boundaries, but that the location be so marked that its boundaries can be readily traced. The law is complied with if the centre line is marked in a district where the extent of the claim on each side of the centre line is established by rule. The marking which in this case was held sufficient was a monument, notice and work at the discovery point, a stake at either end of the centre line being in a line with the cropping, and marked "S. E. stake of P.," and "N. W. stake of P." It seems that the act of 1872 was a revocation of local rules requiring notice and record, and if a locator chose to mark his boundaries at once, the validity of his claim was not affected by his failure to record.

These provisions of the local rules, if remaining in force, only serve to protect the claim during the time reasonably necessary for tracing its course and marking its boundaries. But if such rules were re-enacted after the passage of the act of 1872, then compliance with them became essential.

Southern Cross G. & S. M. Co. v. Europa M. Co., 15, 383 (1880). The placing of stakes and stone monuments at each corner of a claim, and at the centre of each of the end lines, is a sufficient marking of a location.

Utah. *Kahn v. Old Telegraph M. Co.*, 2, 174 (1878). The law provides not only for a description in the location notice, but also that the location should be marked on the ground.

Eilers v. Boatman, 3, 159 (1881). "It is sufficient, to give a right to the occupants of mining ground on the government domain which the courts will protect, to establish by evidence its appropriation by means which are a substantial compliance with the laws upon that subject, and which in view of the surrounding circumstances will give notice to those who have a right to know that the particular mining ground is subject to the dominion and control of some private claimant."

The locator of a claim plainly marked nine hundred feet of it with stakes, with courses and distances given, sufficient to point out to any one honestly endeavoring to ascertain where the lines were for the balance of the fifteen hundred feet. This balance was not marked out because of the inaccessible and precipitous nature of the ground. This location was held good when contested by one who made a new location, taking in the very ground upon which the original locator was working.

"It is neither expected nor required that the locator of a mining

claim, in marking his claim on the ground, so that its boundaries can be readily traced, shall be exact in running the lines or in fixing the corner or other posts." A difference of five feet or a few points between the monuments, fixed by an actual survey for a patent, and those fixed at the time of the location, does not affect the validity of the location.

Warnock v. De Witt, 11, 324 (1895). The statute does not require the marking of boundaries, but the marking of the location so that the boundaries can be traced. Where the location notice gave the dimensions of the claim, and monuments were placed at three corners and at the middle of the end lines, the marking was sufficient.

LAND OFFICE DECISIONS.

If, pending application, the monuments marking the corners of the claim are destroyed by accident or design, the applicant will not be required to re-establish them. Nor is this ground for protest. *Byrne v. Slauser*, 20 L. D. 43, 1895.

In the location of a placer claim on surveyed ground it is not necessary to mark it upon the ground. *Reins v. Murphy*, 22 L. D. 409 (1896).¹

B. Notice of Location ; Posting of Notice.

The rules and regulations of the several mining districts generally, as well as the statutes of many of the States, require the locator to post upon his claim a notice of his location. What this notice must contain is governed by the particular statute or regulation applicable in the district where it is made. Generally it contains the date, extent, and name of the claim, and the name of the locator. Such notice is not required by the laws of the United States, and the requirements of Rev. Stats. 2324 as to contents of record do not apply to it. Originally this notice constituted the initial step of the location and held the claim. "This process seems to be the usual mode recognized among miners to indicate the taking up of a claim of this sort, — as, in fact, an appropriation, or proof of appropriation, of the claim."²

Under the acts of Congress such posting does not amount to an appropriation, and is not accordingly an essential requisite of location in the absence of local or legislative regulations. Nor is it a substitute for marking the location on the ground. The locator must always mark his location upon the ground. This is the

¹ But see L. O. Regulations, par. 62.

² Baldwin, J., in *Gore v. McBrayer*, 18 Cal. 582 (1861).

main act of location. For this purpose he is, as we have seen, entitled to a reasonable time, and in the mean time the notice serves the purpose of warning others of the location, and will give the right of possession to the discoverer until the other steps necessary for completing the title can be taken according to law, provided always that such notice has been posted in good faith, and not as the basis of a speculative location. When, however, the posting of a notice is required by local or legislative regulations, it becomes an essential requisite of location.

Then not only its contents but its place and other details may be regulated by local legislation, which must be complied with.¹ Substantial compliance is sufficient if good faith is shown. The statute or regulation may require the erection of a notice at the point of discovery or upon the vein or lode. In the absence of such a requirement it will be sufficient to place it in such proximity thereto as to give notice of the lode referred to. In the absence of special provision it may be in writing, painting, or carved on any substantial substance so as to be intelligible and open to inspection. It is proper to put it in a tin can and erect over this a mound of stones; and any similar device to protect it from the elements may be adopted, if its position is such as to attract attention. It is such a usual requirement that in the absence of a regulation prescribing it, it may be proven to be a custom, and in that way become essential to the validity of a location. On the other hand, a notice is so liable to obliteration and destruction, and evidence of it so difficult to preserve, that when its posting is in dispute, there is a presumption that it has been properly done, especially in favor of a purchaser.

The recommendation of the Land Office is that the locator "at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery." L. O. Regs., par. 15.

The notices are especially protected from destruction in some States by statutes making it a misdemeanor to deface or destroy

¹ Arizona, Act March 20, 1895, secs. 1, sec. 3610; New Mexico, Comp. Laws 2, and 3, p. 53; Colorado, M. A. S. 3136, 1884, sec. 1566; North Dakota, Rev. Codes 3152; Dakota, Comp. L. 1887, ch. 19, 1895, sec. 1430; Oregon, Hill's Ann. Laws art. 1, sec. 2001; Idaho, Act March 5, 1892, sec. 3828; Wyoming, Laws 1888, ch. 1895, sec. 2, p. 26; Minn., Gen. Stats. 40, sec. 17. 1894, sec. 4066; Montana, Pol. Code, 1895,

them.¹ This act of location and the marking on the ground should precede any other, and when this and the recording of a certificate are required, one who has marked his location and posted his notice, but not yet recorded the certificate, will take priority over another who has recorded a certificate but not yet performed the other two acts.

United States. *Mt. Diablo M. & M. Co. v. Callison*, 5 Sawy. 439 (1879), C. C. D. Nev. The mining laws of Columbus district, sect. 8, provided "Each locator or claimant in any ledge shall be entitled to two hundred feet by location. . . . The locator or locators of any ledge or lode shall also be entitled to hold one hundred feet on each side of said ledge or lode, together with all minerals therein contained." Also, "each claim located shall have a mound or stake placed thereon, on which shall be marked the name of the company, and the number of feet located and claimed," and "all notices of location shall contain the names of locators or claims."

A notice claiming fourteen hundred feet upon a certain lode, "together with all the privileges granted by the laws of the C. Mining District, running seven hundred feet each side of this notice," is sufficient to entitle the locator to hold one hundred feet each side of the lode. When the posting of a notice is a disputed fact, the presumption is that the posting was done. It is, however, such a usual requirement that, in its absence from the printed regulations of a district, it may still be proved to be a requirement by the custom of the district. A second notice may be posted, but it will not affect rights based upon the first notice.

Erhardt v. Boaro, 113, 527 (1885), reversing s. c. 8 Fed. 860. A written notice of a claim to fifteen hundred feet on a mineral-bearing lode or vein in Colorado, signed by the discoverer thereof and posted on a stake at the point of discovery, when made in good faith and not as a speculative location is a valid location of seven hundred and fifty feet on the course of the lode or vein in each direction from that point, and gives the right of possession to the discoverer until the other steps necessary for completing the title can be taken according to law.

Gird v. California Oil Co., 60 Fed. 531 (1894), C. C. S. D. Cal. "It is said for the plaintiffs that this location did not comply with the local rules requiring the notice of the location to be posted on the claim; that putting it in the tin can, and the can in the pile of rocks, was hiding and not posting it. I do not think so. As has been already said, one of the main purposes of the rule requiring the posting of the notice on the claim is for the guidance and protection of other miners seeking to locate claims. And it cannot be doubted that a miner traversing a mining region in search of mining ground, who should see such a mound of rocks as usually marks a mining claim with a tin can care-

¹ Arizona, Penal Code, 947; Colorado, 4070; New Mexico, Act Feb. 5, 1889, sec. Gen. Stats. 910; Idaho, Rev. Stats. 1887, 5, p. 42; Utah, 2 Comp. Laws 1888, sec. 7172; Minn., Gen. Stats. 1894, sec. 2791, p. 138.

fully placed on it, and who was seeking in good faith to inform himself, would fail to examine the contents of the can. The very fact that such a can was put in such a place would indicate to the miner that it was put there for a purpose, and that purpose the protection of a notice of information from destruction by the rains or from other causes."

Doe v. Waterloo M. Co., 70 Fed. 456 (1895), C. C. Ap. 9th Circ. Posting a notice upon a single stake, claiming a right to locate fifteen hundred feet on the lode and three hundred feet on each side, is not a sufficient location and marking of boundaries.

This notice described the claim as the "R. J. Claim." Upon subsequently marking the boundaries, new notices were posted with the name "R. J. Gold, Silver, and Nickel Claim." This was held to be a completion of the original claim notwithstanding the addition to the name.

"It is not necessary that the notice should be placed upon the crop-pings of the vein. If near by the same it would be sufficient, if it indicated the vein sought to be located."

Arizona. *Jantzen v. Ariz. Copper Co.*, 20 Pac. 93 (1889). Where there is a record notice reciting the posting and marking, it will be presumed that these things were done.

California. *Kelly v. Taylor*, 23, 11 (1863). Where the location of a mining claim is made both by posting notices and by designating fixed objects as boundaries, in an action involving title to a portion of the ground the contents of the notices are not the only competent testimony. Witnesses may testify as to the location of the boundaries and whether the location included the ground in dispute.

Harvey v. Ryan, 42, 626 (1872). In an action for possession of a mining claim, where plaintiff relied upon a location under certain rules adopted by the miners of the district, which contained no requirement that notices should be posted on the claims at the time of location, defendant may prove a custom in the district requiring such posting of notice.

Newbill v. Thurston, 65, 419 (1884). Merely erecting a discovery monument and posting thereon a notice claiming a certain number of feet along the ledge in both directions is not a valid location of a mining claim under the act of Congress. Nor can the locator by claiming in his notice a certain time within which to run his boundaries prevent location by others within that time.

Thompson v. Spray, 72, 528 (1887). "We see no reason why, if the locators have any apprehension as to the sufficiency of their notice, they may not put up another one. Whether the second notice is to be treated as an original notice, or whether it relates back to the posting of the first one, is a question as to its effect which it is not material to consider. In the present case the rights of A. and B., whose names were on the first notice, but not on the second, could not be affected by the posting of the second notice. C. and D. had nothing to do with the first notice. Their rights rested on the second, which as to them was an original notice, and they were certainly entitled to have it introduced in evidence. With respect to the two who were on both notices, we think that they also were entitled to have the second introduced in evidence. The second would not operate as an abandon-

ment of the first. But it was not necessary to show such abandonment to render the second notice admissible."

Gregory v. Pershbaker, 73, 109 (1887). Where the local regulations require that the boundaries of a claim shall be marked on the ground, and the notice of its location posted before it is recorded, priority of right of possession under conflicting locations is determined in accordance with priority of marking the boundaries and posting the notice of the respective locations. A location having priority in these acts prevails over one in which the notice is recorded prior to the marking and posting in the former. The act of Congress does not require the posting or registration of a notice, but recognizes the right of miners to require it. A recorded notice gives no information of a claim not actually located. Nor does even a notice posted on the ground, unless it appears that the party posting it is proceeding to indicate with reasonable diligence, or is about to indicate the boundaries by marking them.

Carter v. Bacigalupi, 83, 187 (1890). The act of Congress does not require the posting or recording of a notice upon a mining claim.

Donahue v. Meister, 88, 121 (1891). A notice written on one side of a sheet of paper, which was folded, with the writing inside, and placed on a mound of rocks three feet high, under two flat rocks, so that about three-quarters of an inch of the margin was exposed to view, and which was so placed not for the purpose of concealing it, but in good faith to protect it from the weather, is sufficiently posted to comply substantially with a regulation requiring that "the notice should be posted conspicuously in a conspicuous place upon the claim located."

A substantial compliance with mining customs where good faith is shown is sufficient. The notice is chiefly valuable as a temporary protection to the locator while the other acts are being performed. In the congressional system it is entirely out of place, except as a means of protection during the marking of the location, which is the main act of original location.

Colorado. McGinnis v. Egbert, 8 Colo. 41 (1884). It will be presumed in favor of a purchaser that the preliminary of posting a discovery notice was performed.

Montana. O'Donnell v. Glenn, 8, 248 (1888). A location is not invalid because the locator puts up a notice at a shaft which contains no mineral, when he has discovered mineral at another point in the vein, which is covered by his location, the boundaries of which can be readily traced and the claim identified. The law does not require a discovery shaft, but only a genuine discovery of a mineral-bearing vein with at least one well defined wall, and such a description of it in the declaratory statement of record as will identify it and enable a person easily to trace its boundaries.

Nevada. Phillpotts v. Blasdel, 8, 61 (1872). In order to hold a mining lode it is not necessary that the notice of location should be placed on the ore or any part of the vein or lode; it is sufficient if it be placed in such a reasonable proximity and relation to the ledge as, in connection with the work done under it, to give notice to all comers what ledge is intended.

Gleeson v. Martin White M. Co., 13, 442 (1878). The notice need not contain a description with reference to some natural object or permanent monument. That is only required of the record.

Poujade v. Ryan, 21, 442 (1893). To same effect as last case.

McCormick v. Varnes, 2, 355 (1880). The notice of location is presumed to refer to the surface as well as the vein located; if the latter is held by the notice, the location must be along the general course or strike of the vein.

C. *Record of Location Certificate.*

(a.) *Its Nature and Necessity.*

The final step in the location of a mining claim is the filing of record of the location certificate. This is not required by the act of Congress, and is not a requisite unless required by the law of the State or the regulations of the district. When it is prescribed, its contents are then regulated by the act of Congress. Rev. Stats. 2324.

This certificate is not a muniment of title, nor is it of itself proof of possessory right. It is merely one of the essential steps necessary to constitute a perfected location, its purpose being to give notice of the facts therein set forth and of the claimant's possession. It has therefore been said to be a statutory writing affecting real estate, and in part the basis of the miner's possessory title.

The system is analogous to the registration of deeds, and in many of the States is brought into close relation with the general registration system.¹

The record is evidence of the facts required to be stated therein, but not of other statements which it may contain. And where the claim has passed out of the hands of the locator, has been unchallenged for years, and has been developed, the certificate raises a presumption of discovery and a valid location.

Record follows the other acts of location as they follow discovery. Priority of right is founded not on priority of record, but on priority of discovery and appropriation, which, however, must be followed by record where it is required within the time fixed by law or custom.

¹ Arizona, Act March 20, 1895, secs. 1, Gen. Stats. 1885, secs. 307, 2664; Oregon, 2, and 3, p. 53; Colorado, M. A. S. 3150; Hill's Ann. Laws 1892, sec. 3831; Utah, Idaho, Act March 5, 1895, p. 26; Montana, Pol. Code, 1895, sec. 3612; Nevada, 2 Comp. Laws 1888, secs. 2794-2800.

In the absence of statute or written regulation the obligation to record may be established by proof of a custom prevailing in the district. The existence of such a custom is a question for the jury; but the custom to record and the place of record must be so well known in the district that locators should have no reasonable ground to doubt what is required.

Where record is required by statute, a failure to record, it is submitted, will invalidate the claim. Where, however, the requirement is by local regulation, the location will not be avoided by a non-compliance, unless it is so provided by the regulations themselves. A failure to record within the time limited by statute or regulation will not invalidate the claim, if a statement is properly recorded before rights of others intervene. In this regard these statutes are construed in the same way as recording acts relating to conveyances. Where there is no requirement on the subject, recording is of no effect whatever.

United States. Campbell v. Rankin, 99, 261 (1878). Rev. Stats. 2324 gives no greater effect to the record of mining claims than is given to the records kept pursuant to the registration laws of the respective States, and does not exclude as *prima facie* evidence of title, proof of actual possession, and of its extent.

North Noonday Mining Co. v. Orient Mining Co., 1 Fed. 522 (1880), C. C. D. Cal. Where a rule or custom of miners in force requires a location to be recorded, such recording is necessary; otherwise not.

Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 677; s. c. 7 Sawy. 96 (1881), C. C. D. Cal. If a rule or custom to record is in force in the district at the time, then a record is necessary to perfect and preserve the rights of the locators as against all subsequent locators, at least those not having actual notice of the prior location. It is only necessary to record at the place where the custom known and in force at the time of the location required the record to be made. "And the fact that many miners did so record is evidence tending to show that they thought such record available and relied on it, and tends to show such custom. The custom to record, and the place of the record, to be binding, ought to be so well known, understood, and recognized in the district that locators should have no reasonable ground for doubt as to what is required to make and preserve a valid location."

In determining the existence of such a custom it is proper for the jury to consider the fact that there was an uncertainty as to where the record should be made, some locators recording in the district, some in the county recorder's office, some in both; the fact that no district recorder was elected for several years, and that the miners at their meeting deemed it necessary to ratify previous records.

"The law of Congress authorized miners to make regulations 'governing the location and manner of recording mining claims.' This

language implies that the act of location is distinct and different from the act of recording, except in districts where the regulations of the miners make the recording an act of location, or one of the acts necessary to constitute a location. But in the Bodie mining district there is no evidence of a miners' regulation or rule which makes recording an act of location, or necessary to a valid location. The location is always referred to in the rules in evidence as distinct from and preceding the record, so that a location of a mining claim in that district at any time in the year 1875 may have been complete or perfect before any record thereof was made."

Cheesman v. Hart, 42 Fed. 98 (1890), C. C. D. Colo. Where a claim which has passed out of the hands of the locator has stood unchanged for years, and has been developed, it is proper in an action involving the validity of its location to instruct the jury that the certificate of location is presumptive evidence of discovery, and every reasonable presumption should be indulged in by the jury in favor of the integrity of the location.

Preston v. Hunter, 67 Fed. 996 (1895), C. C. Ap. 9th Circ. "The mere failure to record the declaratory statement within the statutory time does not render the location of the claim invalid where there are no intervening rights before the record is properly made, if there has been a full compliance with the law in all other respects."

A notice which complied with the requirements of Rev. Stats. 2324 was posted on a claim in Montana on Sept. 9, 1892, and was filed of record within twenty days thereafter. The recorded statement was not properly verified as required by Mont. Comp. Stats., sec. 1477. On May 23, 1893, the original notice remaining posted and legible, the locator filed another copy of record with a proper verification. No right having intervened, this recording preserved the validity of the claim.

Haws v. Victoria Copper M. Co., 160 U. S. 303 (1889). Where there is no district recorder, and the regulations of the district have long since fallen into disuse, it is not necessary to record a notice of the location.¹

Arizona. *Jantzen v. Arizona Copper Co.*, 20 Pac. 93 (1889). A recital in a recorded notice of the posting and marking on the ground raises a presumption that these things were done.

California. *English v. Johnson*, 17, 107 (1860). In the absence of any mining rule declaring that a failure to record a claim avoids it, a party may take actual possession of mineral land, though he do not observe requirements as to registry and like acts prescribed by the local rules.

Thompson v. Spray, 72, 528 (1887). No record is necessary in the absence of a custom requiring it. If such a custom is shown, the mere order in which the acts are done are not of sufficient importance to render them of no effect.

Gregory v. Pershbaker, 73, 109 (1887). Where the local regulations require that the boundaries of a claim shall be marked on the ground, and the notice of its location posted before it is recorded, priority as to right of possession under conflicting locations is determined in accordance with priority of marking the boundaries and

¹ *Contra, Ross Lode Claims*, 22 L. D. 83 (1896).

posting the notices of the respective locations. A location having priority in these acts prevails over one in which the notice was recorded prior to the marking and posting in the former.

The act of Congress does not require the posting or registration of a notice, but recognizes the right of miners to require it. A recorded notice gives no information of a claim not actually located. Nor does even a notice posted on the ground, unless it appears that the party posting it is proceeding to indicate the boundaries by marking them.

Souter v. Maquire, 78, 543 (1889). Notice of location need not be recorded unless local rule or custom requires it.

Carter v. Bacigalupi, 83, 187 (1890). The act of Congress does not require the posting or recording of a notice upon a mining claim.

Anthony v. Jilison, 83, 296 (1890). Where the local law does not require recording notice of location, such recording is useless and of no effect.

Pollard v. Shively, 5, 309 (1880). A recorded certificate of location is a statutory writing affecting realty, being in part the basis of the miner's "right of exclusive possession and enjoyment" of his mining location granted by act of Congress May 10, 1872.

Flaherty v. Gwinn, 1, 509 (1879). Proof of record of a mining claim is irrelevant without proof of some regulation making a record obligatory or giving it some effect.

Such a regulation may be established by proof of a usage or custom to that effect. The record books of the district are competent evidence of the existence of such a custom, counsel having stated that they intended to follow it up with other evidence tending to establish a rule making recording obligatory.

Kramer v. Settle, 1, 485 (1873). If one of several co-locators of a mining claim caused notice of location to be recorded in the name of himself and others, in the absence of proof it will be presumed that the written consent of such others, as required by sec. 5 of the act in relation to mines, had been seen, and a minute made thereof by the recorder, before such notice.

Poujade v. Ryan, 21, 449 (1893). The fact that the notice had been recorded is of no importance where there is no evidence of a rule requiring record. The court refused to take judicial notice that there was a universal custom applicable to all mining districts to require the recording of locations.

(b.) *Contents of the Record.*

Where the location is, by State or Territorial law or local regulation, required to be recorded, the contents of the record must be in accordance with the provisions of Rev. Stats. 2324. Under this section the record must contain three things: 1st, The name or names of the locators; 2d, The date of the location; 3d, A description of the claim; and this last must be such, "by reference to some natural object or permanent monument, as will

identify the claim." The States and the miners' meetings may require the specification of other things; but every record must contain these requirements or it is invalid.¹

The description to be sufficient must fulfil two requirements. It must refer to a *natural object* or *permanent monument*, and it must be clear enough to identify the claim. A natural object is any prominent fixed object placed by nature in the landscape. A permanent monument is some object placed permanently in the ground for the purpose of defining the claim in question or some other claim or tract of land. The natural object or permanent monument need not be upon the claim itself, and the identification of the claim need not be absolutely certain. Any prominent mountain, valley, cañon, river, tree, etc., will usually suffice, provided the relation which the location bears to it is *clearly* defined, and it is capable of identification. When no such reference can be made owing to the peculiarity of the situation, stakes driven in the ground, or an accurate reference to a neighboring mine, will be presumed to fall within the meaning of the requirement in the absence of contradictory proof. The sufficiency of the identification is for the jury.

Whether the object referred to is a "natural object" is to be determined by the court, and as to whether it is a "permanent monument," it is for the court to define what is such, and for the jury to determine under this instruction whether the object in question comes within the definition. For example a prominent post or stake firmly planted in the ground, and a shaft which had been sunk, have been decided to be within the meaning of the term, and even the permanent monuments of a neighboring claim.

The description must be sufficiently definite to identify the claim with reasonable certainty. It is governed by the same rules as descriptions in conveyances.

It is usual, even where not required, to make the contents of the location notice comply with the requirements of the recorded certificate, and then simply to record a copy of the notice. This is the course prescribed in Arizona, Idaho and New Mexico by stat-

¹ Arizona, Act March 20, 1895, sec. 1, 4073-5; Montana, Pol. Code 1895, secs. p. 53; Colorado, M. A. S., secs. 3136, 3612, 3616; N. Mexico, Comp. Laws 1884, 3150; Dakota, Comp. L. 1887, ch. 19, art. sec. 1566; North Dakota, Rev. Codes 1895, 1, sec. 1999; Idaho, Act March 5, 1895, sec. 1428; Wyoming, Act Feb. 21, 1895, sec. 4, p. 26; Minn., Gen. Stats. 1894, secs. p. 247.

ute, and has the endorsement of the Land Office. Regulations, pars. 14, 15. In the absence, however, of statute or regulation making this requirement, it is not necessary that the recorded certificate be a copy of the posted notice.

By the Land Office Regulations it is also said to be essential that, in addition to the description, this certificate should state how many feet are claimed on each side of the discovery point.

A record which does not comply with the legal requirements is of no effect as a record. In some States it is void by statute.¹ Generally the record should contain but one location.²

North Noonday M. Co. v. Orient M. Co., 1 Fed. United States. 522 (1880), C. C. D. Cal. To make a valid record it must contain the names of the locators, the date of the location, and such a description of the claim, by reference to some natural object or permanent monument, as will identify the claim; but such natural objects or permanent monuments are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. If by reference to any such natural object or permanent monument the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular; otherwise not.

Faxon v. Barnard, 4 Fed. 702 (1880), C. C. D. Colo. The Revised Statutes of Colorado declare that the certificate of location shall give "such description as shall identify the claim with reasonable certainty." *Held*, under this and Rev. Stats. 2324, that a certificate which described a claim as "situated on the north side Iowa Gulch, about timber line, on the west side of Bald Mountain . . . staked and marked as the law directs," was void for uncertainty of description.

Jupiter M. Co. v. Bodie Cons. M. Co., 11 Fed. 677; s. c. 7 Sawy. 96 (1881), C. C. D. Cal. "If a record was required, then, in order to make a valid record, it was necessary for it to contain the name or names of the locator or locators, the date of the location, and such a description of the claim or claims located, by reference to some natural or permanent monument, as would identify the claim.

"The natural objects or permanent monuments here referred to are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground."

Fuller v. Harris, 29 Fed. 814 (1887), C. C. D. Alaska. A record

¹ Arizona, Act March 20, 1895, 'sec. 2, p. 53; Colorado, M. A. S. 3151; Dakota, Comp. L. 1887, ch. 19, art. 1, sec. 2000; North Dakota, Rev. Codes 1895, sec. 1429; Wyoming, Laws 1888, ch. 40, sec. 16.

² Colorado, M. A. S. 3163; Dakota, Comp. L. 1887, ch. 19, art. 1, sec. 2011; Idaho, Act March 5, 1895, sec. 8, p. 26; North Dakota, Rev. Codes 1895, sec. 1440; Wyoming, Laws 1888, ch. 40, sec. 8.

made in a memorandum book of the location of a placer mining claim, without designating any natural object or permanent monument, or any designation or work by which the placer claim could be identified, the book being retained in the possession of the locator: *Held*, not to be in compliance with Rev. Stats. 2324, and of no legal force as a record.

Hammer v. Garfield Mining Co., 130, 291 (1889), affirming s. c. 6 Mont. 53. The provision in Rev. Stats. 2324, that records of mining claims shall contain such "reference to some natural object or permanent monument as will identify the claim," means only that this is to be done when such reference can be made; and when it cannot be made, stakes driven into the ground are sufficient for identification, or a reference to a neighboring mine, with distance and date of location, which will be presumed to be a well-known natural object in the absence of contradictory proof.

Gird v. California Oil Co., 60 Fed. 531 (1894), C. C. S. D. Cal. From the recorded notice of a placer claim certain words were erased, and it was contended that the record was not a copy of the posted notice. No motive was shown on the part of the recorder to make a false or fraudulent record, and the notice as recorded was sufficient to identify the boundaries. It was held to be good.

"Moreover, it is not necessary that the record of the claim should be a literal and exact copy of the notice posted on it. The record of a mining claim, when one is required, is intended to contain a more exact and specific description of the claim than the notice posted upon it. This is clearly shown by the circumstance that the statute does not require any notice to be posted or recorded, but leaves the regulation of that matter to the miners of the district, subject, however, to the provisions" as to the contents of the record.

Duryea v. Boucher, 67, 141 (1885). "The notice as recorded and posted was sufficient. It described the land by the adjoining tracts on the northeast and south, and on the west by unoccupied lands. As the claim was for thirty acres, its boundary on the west could be easily determined. It makes no difference that the wrong legal subdivisions are inserted in the notice; these may be rejected as false where the remaining description sufficiently identifies the land." This was an action to determine the right of possession to a mining claim under Rev. Stats. 2326.

Carter v. Bacigalupi, 83, 187 (1890). A mining regulation requiring a notice with "such a description by reference to some natural object or permanent monument as will identify the claim," it is sufficient to describe the centre lines, and state that the claim is for a certain number of feet on each side of it. A natural object, with reference to which a starting point is located, will be presumed to be known or ascertainable.

"A black oak about four hundred feet northerly of an old cross-cut or drift in the ravine," and a "black oak near a small ravine on the north side of Turnback Creek," are sufficient descriptions. It is essential that the notice as posted or recorded should state the district, county, or State in which the claim is situated.¹

¹ But see *Metcalf v. Prescott*, 10 Mont. 283, post.

Colorado. *Pollard v. Shively*, 5, 309 (1880). The purpose of the description is identification of the claim with reasonable certainty, and it is governed by the same rules as descriptions in conveyances of real estate. The courses and distances of the location must yield to its monuments, whether natural or artificial. Where monuments are relied on to control courses and distances, they must be found as called for. Where a post is called for as a corner, parol evidence is inadmissible to prove that, in fact, a stump marked the corner.

A claimant who has not kept up his boundary posts will not be permitted to show the courses and distances of his recorded location to be erroneous, when the rights of an intervening locator, without notice, will be prejudiced.

Quimby v. Boyd, 8, 194 (1884). A tree is a "natural object or permanent monument" within the requirement of Rev. Stats. 2324, that the description in the record of a mining claim shall be by reference to such. It should be marked so as to be readily identified, unless it possesses peculiarities so different from other trees that a description thereof is sufficient to identify it.

It is not necessary that a location certificate of a mining claim should state the distance from the discovery shaft to the side lines.

Gilpin Co. v. Drake, 8, 586 (1885). The following description in a location certificate was held *not* to be such "by reference to some natural object or permanent monument as will identify the claim."

"Beginning at the westerly end of the G. C. M. Co.'s property on the Williams Lode in L. G. mining district, runs thence in a westerly direction a distance of fifty feet to the easterly end of the P. & U.'s property on said lode." The claims referred to were patented claims, and supply the permanent monuments required, but the description is too indefinite to enable a full identification or a tracing of the boundaries.

Drummond v. Long, 9, 538 (1886). Neither the provisions of the Federal nor those of the State statutes as to descriptions of claims in location certificates are satisfied by a description made with reference to the discovery shaft which was described as being in a certain mining district "on the southwest side of Mount Hardin in Portland Gulch, about fifteen hundred feet north of Hawk Eye Lode."

The intention of the acts is to give one seeking the *locus* of a recorded claim something in the nature of an initial point from which to start, and, following the courses or distances given, to find, with reasonable certainty, the located claim. The identification must be by reference to some natural object or permanent monument. The permanent monuments of a neighboring claim are sufficient. But here the discovery shaft is not tied to any corner or monument of either lode or location of the Hawk Eye.

Craig v. Thompson, 10, 517 (1887). A location certificate described the claim by reference to two mountain peaks, — one on the east side of M. Gulch on C. Creek, the other at the head of L. Fork of C. Creek, — by giving the course or bearing of each from the discovery shaft in degrees and minutes. *Prima facie* this was sufficient, taken in connection with the balance of the description, to identify the claim,

and the certificate was admissible in evidence. If other mountain peaks exist in the same vicinity, visible from the same point, or if for any other reason neither of those mentioned in fact served to identify the claim, that was matter for appellant to show by proper proof.

Jackson v. Dines, 13, 90 (1889). "The description of the claim by reference to its direction from 'mountain peaks,' without naming or describing them, or stating the distance therefrom, may be insufficient; but the location of the claim is further described as being situated on the Arkansas River, near T. city, that the shaft or cut one hundred feet from the southside line is on the left bank of a small creek called C. Creek; also the bearings of perpendicular falls in said creek from the shaft or cut are stated. The certificate further shows the State, county, and mining district in which the claim is located, and the metes and boundaries thereof." It is not requisite that the markings on the ground which are required by the act of Congress should be described in the record of the claim.

Montana. Connerv. McPhee, 1, 73 (1868). A statute provided "all claims shall be recorded in the county recorder's office within ten days from the time of posting notices." The record need not specify the number of feet claimed. It is error to exclude such a record because it does not contain such specification. "Recording a claim is a phrase used among the locators of mining claims," and at the time this statute went into effect it was not generally considered necessary to record the number of feet claimed.

Russell v. Chumasero, 4, 309 (1882). The record of a mining claim must, under the act of Congress, contain such a description thereof by reference to some natural object or permanent monument as will identify it. "But it is not for the court to say, by merely looking at a record or declaratory statement, what are or what are not permanent objects or monuments; that is a matter of proof." A description giving other claims for boundaries may be good if those claims are marked upon the ground as the law contemplates. This should be open to proof. It is error to reject the record upon mere inspection by the court.

Garfield M. & M. Co. v. Hammer, 6, 53 (1886), affirmed in 130 U. S. 291. A recorded notice of location which describes the claim by courses and distances, and as being a certain number of feet from a well-known quartz location, sufficiently complies with the requirements of the act of Congress. The location named in the absence of evidence will be presumed to be well known. In the absence of evidence the court will not, upon inspection, declare a description insufficient.

Flavin v. Mattingly, 8, 242 (1888). The recorded notice of location describes the claim as "situated in Summit Valley, M. Dist. Silver Bow Co. Mont. Ty., and on the northerly side, about one-fourth of a mile from Park Cañon." It then states the boundaries as marked. This was admissible in evidence. Its sufficiency was for the jury. "A natural object is any prominent feature in the landscape, and certainly a cañon is as much a natural object in the landscape as the mountains which lie on either side of it, or a river

or a plain. Whether or not a reference to it will be sufficient must often depend on parol evidence, for its length may render a reference to it indefinite, while it might possibly be shorter than the length of a mining claim. The object of the law in requiring the location to be made with reference to some natural object or permanent monument is not very apparent, unless it was for the main purpose of directing attention in a general way to the vicinity or locality in which the location was to be found; for the boundaries, distances, and the courses are to be particularly marked and permanently fixed in such a way as to give notice that the land has been claimed. How much accuracy is required in this reference to natural objects and permanent monuments is not set forth in the statute, and we are not inclined to hold that there must be a strict compliance with the act, where there is a *bona fide* effort made to comply with the laws."

O'Donnell v. Glenn, 8, 248 (1888). As to the sufficiency of the description in the notice it is for the court to define what is a permanent object, and for the jury to determine whether the object described comes within the requirements of the law. The description here called for a stake. "Whether it was of such a size and so firmly planted in the ground as to come within the meaning of the words 'permanent monument' properly defined, was for the jury to find under instructions from the court."

Flick v. Gold Hill & Lee Mt. M. Co., 8, 298 (1889). The territorial statute (Comp. Stats., div. 5, sec. 1477), requiring the recording of lode claims, only requires a description of the claim in the manner provided by the laws of the United States, which manner is provided by Rev. Stats. 2324. Recital in a recorded notice of citizenship, discovery, marking of boundaries, are unnecessary, and the record is not evidence of such facts.

Gamer v. Glenn, 8, 371 (1889). While the law of the United States requires a location to be marked on the ground so that its boundaries can be readily traced, the law does not require that these boundaries should be put in the recorded declaratory statement. A description in such a statement is sufficient to take it to the jury, which describes the claim with reference to a boulder, a house, and three other lodes.

Metcalf v. Prescott, 10, 283 (1891). Where a location certificate is recorded in J. county, but it is stated in the certificate that the claim is in L. county, it is error to reject evidence that it is actually in J. county. The statement of the county in the notice was not required by law, and was surplusage.¹

It is error for the court to decide from an inspection of notices whether or not the objects with reference to which the claims are described therein are permanent monuments. This is a matter of proof.

Dillon v. Bayliss, 11, 171 (1891). "A description by reference to an adjoining mining claim is a sufficient reference to a permanent monument to allow the notice of location to be introduced in evidence, and it then becomes a matter of proof as to whether the adjoining claim is a permanent monument."

¹ But see *Carter v. Bacigalupi*, 83 Cal. 187, *ante*.

A notice described the claim as so many feet long running east and west along the vein, and so many feet wide, and named the district, county, and territory. It stated that a post and notice were set at the discovery shaft, and that there was a substantial post and monument at each corner, and that the M. H. claim was on the southeast, the N. H. on the southwest, and the St. L. on the north, and that the claim began at the southwest boundary of M. H., ran two hundred feet more or less, bounded on the northwest by the St. L., to the place of beginning. *Held*, that it could not be said from an inspection that the description was impossible or uncertain; the notice was admissible.

Mathematical exactness is not required of the locator, and much liberality is extended to him who does the best that the circumstances allow. The admission in evidence of the certificate is not conclusive of the sufficiency of the description. Evidence is admissible that one could not take the description, and, by referring to the permanent monuments mentioned therein, find the premises claimed.

Southern Cross G. & S. M. Co. v. Europa M. Co., 15, 383 Nevada. (1880). A recorded notice which called for stone monuments at each corner of the claim, and described it as bounded by four other claims, is sufficient.

Brady v. Husby, 21, 453 (1893). A recorded notice which describes the claim as "on the Cortez Mountain," sufficiently refers to a natural object.

In this case the boundaries were clearly marked, and a large amount of work had been done. Defendant had written the notice for the plaintiff, and had assisted in making the location. "He knew all about the location, and was in no wise deceived or misled by the defective record. His only claim of right to relocate the ground is based upon the technical failure of the notice and record to comply with the law. Under such circumstances, while to the extent that the statute is imperative it must be complied with, justice requires that the record shall be construed as liberally as the law will reasonably permit."

Seidler v. Lafave, 4, 869 (1889). The description in a recorded location notice was by reference at two points to the corners of another claim. Parol testimony was admissible to show that there were monuments at these corners, and that, consequently, the description was by reference to permanent monuments.

Allen v. Dunlap, 24, 229 (1893). The notice described the claim as "Commencing at this notice, and running seven hundred and fifty feet in a southwesterly direction, and seven hundred and fifty feet in a northwesterly direction." It was contended that this meant seven hundred and fifty feet in one direction and back again to the starting point. The court held, however, that the meaning was seven hundred and fifty feet in each direction.

Rev. Stats. 2324 does not require notice of a mining claim to be either posted or recorded, but intrusts that matter to local regulation, subject to the condition that when a notice is required to be recorded it shall contain, among other things, a description of the property.

Darger v. Le Sieur, 30 Pac. 363 (1892). A location notice, in which the claim is described as "situated up near head of the right-hand fork of what is known as 'Tie Cañon,' about five miles

from the Denver & Rio Grande Railroad in Utah Co.," is fatally defective. There is no compliance with the requirement of Rev. Stats. 2324, and a location made under such a notice is invalid.

Hanson v. Fletcher, 37 Pac. 480 (1894). Trees blazed and squared, and rock monuments marked as corner and end posts, and the prospect hole, are permanent monuments within the meaning of Rev. Stats. 2324, requiring the claim to be described with reference to some natural object or permanent monument. The fact that the notice called for stakes, when, in fact, the monuments were trees cut off, blazed and squared, is immaterial.

(c.) *Verification of the Certificate.*

In Montana¹ and Idaho² the declaratory statement (certificate of location) referred to in the previous section must be sworn to before it will be admitted to record. This oath must relate to the facts contained in the notice, which, as we have seen, must be in accordance with the requirements of the United States statute; i. e. every requirement of a recorded notice under the Revised Statutes (the names of locators, the date of location, and the description of the claim) must be sworn to. The omission of any of these will vitiate the record. The act of Congress does not contemplate such an affidavit, nor does it seem to be required by any of the other States or Territories.

Montana. *McBurney v. Berry*, 5, 300 (1885). The oath to a declaratory statement required by sec. 873, div. 5, 590 Rev. Stats., must be in the nature of an affidavit to the facts stated in the notice, which must be in accordance with the requirements of Rev. Stats. 2324. A notice, the affidavit to which was only as to discovery and citizenship, was inadmissible in evidence.

Wenner v. McNulty, 7, 30 (1887). W. and H. were the joint locators of J. lode. W., acting for himself and H., made the discovery, and informed H., who made out the declaratory statement in accordance with the legal requirements, signed his own and W.'s names, and himself made affidavit to it. The affidavit was valid under Rev. Stats. Mont., sec. 873, div. 5 (Comp. Stats., sec. 1477, div. 5).

O'Donnell v. Glenn, 8, 248 (1888). The law of the Territory Comp. Stats., sec. 1477, p. 1054, requiring an oath to a declaratory statement, is not in conflict with the law organizing the Territory. Under that act every requirement of a recorded notice, under Rev. Stats. 2324, must be sworn to. The omission to swear to the date of the location, though it is contained in the notice, renders the notice insufficient.

O'Donnell v. Glenn, 9, 452 (1890). The form of verification above

¹ Pol. Code 1895, sec. 3612.

amended by Act March 5, 1895, sec. 13.

² Rev. Stats. 1887, sec. 3104, as p. 26.

(without date of location) was sought to be sustained on the ground that, being in general use, the maxim *communis error facit jus* prevailed. This contention was not allowed, because (1) The alleged error had never received the approval or toleration of judicial or legal opinion; (2) The statute laws are peremptory; (3) The error was not universal; (4) Large property rights were not shown to depend on it; (5) No considerable number of people relied upon or sought to fix their rights upon it; (6) It existed but a short time; (7) Was not clearly proved; (8) Was in direct disobedience of the laws and not an effort to observe them.

Metcalf v. Prescott, 10, 283 (1891). A location certificate is void when there is no jurat of the notary to the affidavit, but simply his signature and seal.

McCowan v. McClay, 16, 234 (1895). It is within the power of the State legislature to require that the recorded notice of location shall be on oath, as in sec. 1477, 5th div., Comp. Stats.

Under this section the declaratory statement must be of the discovery or location as well as of the description, and when an affidavit states merely that "the description of said lode," as given in the notice, is true and correct, this is a verification as to one item only, and the statement is fatally defective.

The statement in such an affidavit, that the locators "have in every respect fully complied with the requirements of chapter 6 of title 32 of the Revised Statutes of the United States and the local customs and laws regulating mining locations," is a conclusion of law and not a verification of any fact.

Berg v. Koegel, 16, 256 (1895). An affidavit to a declaratory statement which shows that it was made before the location is fatal to the validity of the location, in the absence of proof that it was wrongly dated by mistake.¹

(d.) *Amendment of the Record. Additional Certificates.*

A locator may correct his recorded certificate by filing an amendment or additional certificate, and this will take effect as of the date of the original, provided no rights of third parties have intervened. As against such parties the new certificate cannot relate back to the date of the original record, but is treated as filed as of the actual date of filing.²

The law is well stated in the Colorado Statute M. A. S., sec. 3160.³

McEvoy v. Hyman, 25 Fed. 596 (1885), C. C. D. United States. Colo. The first record of a mining claim is usually, if not always, imperfect, and it is the policy of the law to give the

¹ See also *Preston v. Hunter*, 67 Fed. 19, art. '1, sec. 2008. Arizona, Act March 20, 1895, sec. 7, p. 53; Idaho, Act March 20, 1895, sec. 5, p. 26; New Mexico, Act Feb. 5, 1889, sec. 4, p. 42; North Dakota,

XII. ² See further on this subject Chap. XII. ³ See also Dakota, Comp. L. 1887, ch. Rev. Codes 1895, sec. 1437.

locator an opportunity to correct his record when defects are found therein, and when it is corrected the amendment takes effect with the original as of the date thereof.

"Errors and mistakes in certificates of location are of frequent occurrence. Under the law as it is at present a fully complete and unimpeachable certificate cannot be made without the aid of a surveyor and the best instruments. It is often, and perhaps generally, impracticable to obtain the services of a surveyor in making a location, and the miner must depend upon his own skill and judgment. In such effort he usually fails. Indeed, it may be said, as to the course of his lines, he is always in error, and the natural object and permanent monument required by section 2324 are entirely beyond his grasp. He does not know what they are, nor how to refer to them. Every one who is at all familiar with mining locations knows that in practice the first record must usually, if not always, be imperfect. Recognizing these difficulties, it has never been the policy of the law to avoid a location for defects in the record, but rather to give the locator an opportunity to correct his record whenever defects may be found in it, and the section (Gen. Stat. Colo. 2400) which declares that defective certificates shall be void, when read in connection with section 25 (2409), and qualified by it, will be understood as saying that defective certificates are lacking in force and sufficiency until amended as provided in section 25 (2409), but not wholly void."

Fuller v. Harris, 29 Fed. 814 (1887), C. C. D. Alaska. At the time of the location of a quartz mining claim by the employees of the claimant, there were no local rules of the mining district requiring a record of the location. Subsequently the claim was located by the owner so as to conform to the requirements of the act of Congress. *Held*, that as there was a real location of the claim by the employees of the claimant, they being his agents, his title dated back to the first location.

Tombstone Town Site Cases, 15 Pac. 26 (1887). A **Arizona**. notice of location of the ground was filed Feb. 25, 1879. It was so uncertain that the land could not be identified, and was aided by no evidence. The record was amended on Nov. 20, 1880, and a mineral patent for the land described in the amendment was issued Aug. 15, 1882. A town site covering the land was entered April 9, 1880. This latter prevailed.

Strepey v. Stark, 7, 614 (1884). An "additional" **Colorado**. location certificate differs from documentary muniments of title. It is not proof of title, nor does it establish a possessory right. It is, when recorded, notice of the facts required to be set forth therein, and is one of the steps requisite under the statute to constitute a mining location. Four things are necessary in order to perfect a location: (1) Sinking of a discovery shaft; (2) Posting a discovery notice; (3) Marking the surface boundaries; (4) Making and recording a location certificate. To establish a right of possession under an alleged location, the first three of these must be proved by evidence outside of the certificate. The certificate, when recorded, is evidence of the date of location, the description of the premises,

and the compliance with the statutory requirements of making out and recording the same.

An additional certificate operates to cure defects in the original, and thereby to put the locator, where no other rights have intervened, in the same position he would have occupied if no such defects had occurred. Its admissibility in evidence is not affected by the circumstance that it was filed after acquired right of interest, but merely relates to the right of possession which must have been acquired prior to the filing of the certificate, and to the acquisition of any intervening right of the adverse party.

Craig v. Thompson, 10, 517 (1887). Where one has made a location valid in other respects, but had filed an invalid certificate, an amended certificate, filed before the defendant had acquired intervening rights, would as to him relate back to and preserve the claim as originally located. The defendant did not acquire intervening rights by acts done upon the land within the sixty days after plaintiff's discovery in which he was entitled to do his discovery work. The defendant was then a trespasser.

Seymour v. Fisher, 16, 188 (1891). The law allows a change of boundaries when amended certificates are filed, and an injury to superior rights thereby is effectually waived by failure to adverse.

Becker v. Pugh, 17, 243 (1892). An amended location certificate is not void because it covers additional ground. It is not necessary, in order to hold that ground, to sink a new discovery shaft and fix new boundaries in the same manner as if it had been an entirely new location. Nor is it necessary to sink the original discovery shaft ten feet deeper.

(e.) *Mistakes in the Record.*

Where the locator has honestly complied with all the local rules and requirements as well as those set forth by the act of Congress, mistakes of the recorder in copying the certificate will not divest his title.

California. *Myers v. Spooner*, 55, 257 (1880). Where locators of mining claims have complied with the local rules and regulations in making their location, their title cannot be affected by a mistake of the recorder in copying the notice in the record book.

Colorado. *Weese v. Barker*, 7, 178 (1883). Where a location certificate appears to be in compliance with the statute, a mistake by the recorder, who recorded the name "Farmer Boys" instead of "Tanner Boys," which did not mislead the subsequent locator, cannot avail the latter.

(f.) *Requirements as to the Time and Place of recording Certificate.*¹

These are matters of State, Territorial, or local regulation. The act of Congress makes no requirement as to the time or place in which the certificate must be filed.²

Where the State or district does not prescribe the time within which the certificate must be recorded, it should be done within a reasonable time. The Land Office suggests twenty days after the location has been marked on the ground. Regulations, par. 16.

A failure to record the certificate within the time fixed by law may be cured at any time by recording it, provided no other certificate for the same claim, based on the requisite precedent acts of location, has been recorded. After the expiration of the limited time without the recording of the certificate, a record filed which is based on a junior discovery becomes the senior location.

United States. *Faxon v. Barnard*, 4 Fed. 702; s. c. 2 McCrary, 44 (1880), C. C. D. Colo. The Colorado statute requires that the certificate of the location of a mining claim must be filed of record in the office of the recorder of the county in which the claim may be, within three months next after the discovery of the lode. *Held*, that failure to record the certificate within the prescribed time would not render the same invalid, provided all things had been done as the act required, before any other and better right to the same ground had been perfected.

Therefore when the Ontario lode was discovered on the public land, Feb. 11, 1878, the location completed in July of the same year, and the Green Mountain lode was discovered in August, 1877, and the location completed by filing for record a certificate of location in March, 1878, and these two locations partly overlapped each other, it was held that the claim of the Green Mountain lode would prevail over the Ontario lode upon the question of priority of discovery and location.

California. *Thompson v. Spray*, 72, 528 (1887). Recording notice before posting does not invalidate it.

Idaho. *Kramer v. Settle*, 1, 485 (1873). A failure to record a notice of location within the required time may be cured by recording it before a subsequent location.

¹ See also Div. II., this chapter.

² Arizona, Rev. Stats. 1887, sec. 2349; Pol. Code 1895, sec. 3612; New Mexico, Colorado, M. A. S., secs. 3136, 3150; Comp. Laws 1884, sec. 1566; Oregon, Hill's Ann. Laws 1892, sec. 3828; Wash., Gen. Stats. 1891, sec. 2216; Wyoming, Act March 5, 1895, sec. 4, p. 26; Minn., Gen. Stats. 1894, secs. 4073-5; Montana, Act Feb. 21, 1895, p. 247.

CHAPTER VIII.

THE EXTENT OF THE CLAIM.

I. Lode Claims.
II. Placer Claims.

III. Cases arising prior to the Act of
1872.

PRIOR to 1866 in the case of lode claims, and 1870 in the case of placer claims, the amount of ground and the length of lode which might be located in a single claim was determined by the regulations of the district in which the location was made. In the absence of regulations, the claim was invalid if unreasonable in extent as creating a monopoly, and the reasonableness of the extent was determined by the general usage of the country. Congress in 1872 (Rev. Stats. 2320) fixed 1,500 feet as the length along the vein or lode which a single claim might equal, and 300 feet on each side of the middle of the vein (or the point of discovery) as the width beyond which the claim should not extend. In other words, the maximum dimensions of a location for a lode claim allowed under the United States statutes now in force are 1,500 by 600 feet; but within this extreme local regulations may limit the extent to any distance not less than 25 feet on each side of the middle of the vein. This distance may be measured from the walls or sides of the vein if so provided by the provisions of local regulations, but such measures are not contemplated by the United States law. If a claim is located so that it calls for a greater extent than prescribed by the act and the local regulations, and this is done inadvertently or without the purpose of exceeding the legal limit, it is not entirely void, but only as to the excess over the legal amount. But if such a location is made without excuse, and is grossly excessive, it is entirely void. A patent issued for an excessive location is subject to the same rules as the location, and is void as to the excess.

The size of placer claims is prescribed by the acts of 1870 and 1872, Rev. Stats. 2330 and 2331. According to the provisions of these, the extent of a placer location is limited to twenty acres

for each individual, and no association can locate more than one hundred and sixty acres. The restrictions imposed by these sections do not prevent the locators from purchasing any number of other contiguous claims which have been properly located by others, and obtaining a patent for the whole as one claim.¹ A patent for such a claim is valid. But, on the other hand, the mere use of the names of a number of locators who have agreed to convey their interests to the actual locator for whom they have acted as agents without consideration, the purpose being to evade the restrictions as to the extent of locations, is against public policy, and equity will not enforce a trust based on such an agreement.

I. LODE CLAIMS.

A location as a lode claim, as above stated, is now governed by the provisions of Rev. Stats. 2320, which limit such location, whether made by an individual or an association composed of a number of persons, to 1,500 feet in length in the direction of the lode or vein. This may not be limited by State or Territorial laws or local regulations. As to the width of the claim, it must not exceed 300 feet on each side of the middle of the vein at the surface. This distance, however, may be limited by statutory or district regulation. Such regulation may not limit the surface ground to less than 25 feet on each side.² The lateral measurement cannot exceed 300 feet on either side; the deficiency of one side cannot be made upon the other. The greatest extent of a lode claim, therefore, is a parallelogram 1,500 feet by 600. The length of this cannot be decreased. The width may be limited to 50 feet.

Although a claim was located before 1872, and in accordance with a custom prescribing a greater width than 600 feet, it is not in the power of the Land Department to issue a patent for a greater extent than is provided in Rev. Stats. 2320.

The shorter sides of the rectangular piece of ground are called end lines, and they must always be parallel. The longer sides are called side lines.³ Where the middle of the vein has not

¹ In the case of placers, it seems, these need not be contiguous.

² Colorado, M. A. S. 3148, 3149; Dakota, Comp. L. 1887, ch. 19, art. 1, sec. 1998; Idaho, Rev. Stats. 1887, sec. 3100; North Dakota, Rev. Codes 1895, sec. 1427;

Oregon, Hill's Ann. Laws 1892, sec. 3827; Utah, 2 Comp. Laws 1888, sec. 2790; Wash., Gen. Stats. 1891, secs. 2210-2211; Wyoming, Laws 1888, ch. 40, secs. 13, 14.

³ As to rules governing the direction of these lines see Chap. XV., Div. I.

been developed by exploration, the point of discovery is presumed to be the middle of the vein for purposes of measurement. See L. O. Regs., pars. 9, 10, 11.

As some existing titles may be governed by the law as it stood previous to 1872, it is important to know that law. Until July 26, 1866, the length of lode claims was governed by district rules or State legislation. The act of Congress of July 26, 1866, sec. 4, which remained in force until May 10, 1872, provided that locations should not exceed two hundred feet along the lode for each locator, except that the discoverer might have an additional claim, and no association could appropriate more than 3,000 feet. The important cases upon the law previous to May 10, 1872, are collected below on page 261.

United States. Jupiter M. Co. v. Bodie M. Co., 7 Sawy. 96 (1881), C. C. D. Cal. Under the act of Congress a claim may be located one thousand five hundred feet along the length of the vein, and three hundred on each side of the middle of the vein. This may be limited to not less than twenty-five feet by a rule, regulation, or custom in force at the time of location. A claim having been located under the provision of the act of Congress as to extent, and a regulation having been set up, limiting the width to fifty feet on each side of the vein, if the jury find that such a regulation existed at the time of the location, the location is void as to the excess only.

Richmond Co. v. Rose, 114, 576 (1885). When the statutes of the United States and local laws of a mining district authorized a location on a vein of only two hundred feet by each locator, a location by mistake for more than two hundred feet was not thereby made entirely void, but was good for two hundred feet and void only as to the excess.

Parley's Park Co. v. Kerr, 130, 256 (1889). Mining regulations of Blue Ledge District, adopted May 17, 1870, provided that the surface width of any location should not exceed one hundred feet on each side of the wall rock of the lode. At a meeting on May 4, 1872, held to amend the rules, it was enacted that the surface width should be governed by the laws of the United States. The width of claims in this district were consequently governed by the act of Congress of May 10, 1872, Rev. Stats. 2320.

Lakin v. Dolly, 53 Fed. 333 (1891), C. C. N. D. Cal. The Land Department has no jurisdiction, power, or authority to issue a patent for a lode to any surface ground exceeding three hundred feet in width on each side of the middle of the vein, and any patent which is issued for more than that amount of surface is null and void as to the excess over three hundred feet, and can be collaterally attacked in a court of law.

Lakin v. Roberts, 54 Fed. 461 (1893), C. C. App., 9th Circ., affirming last case. Under Rev. Stats. 2320 a patent cannot be issued for a

claim exceeding three hundred feet in width on each side of the vein, although the original location was wider, and was made under the law of 1866, by which the width of claims was regulated by the custom of miners. Where a patent is issued for the full width of such claim, it is void as to the excess, and Rev. Stats. 2328 cannot be construed to preserve a right to the full width located and covered by the patent.

California. *Thompson v. Spray*, 72, 528 (1887). Upon the dismissal of the action as to some of the plaintiffs, the defendant moved for a nonsuit as to the others, upon the ground that the dismissal left these claiming more than they were entitled to hold by law. But the location was held to be good for as much as the party was entitled to hold, and void as to the excess only. *Richmond Co. v. Rose*, 114 U. S. 576.

Doe v. Tyler, 73, 21 (1887). The inclusion of greater length than the law allows does not render a claim totally void. This may occur, and often must occur, by accident of the surveyor or other innocent mistake, where no intention exists to claim more than the amount allowed by law. There is no reason why the excess may not be rejected, and the claim be held good for the remainder.

Idaho. *Atkins v. Hendree*, 1, 95 (1867). When a location is made greater in extent than allowed by law, it is not entirely void, but only as to the excess.

Montana. *Foot v. National M. Co.*, 2, 402 (1876). Act of Legislative Assembly of Dec. 26, 1864, sec. 3, provides, "Claims on any lead, lode, or ledge, either of gold or silver, hereafter discovered shall consist of not more than two hundred feet along the lead, lode, or ledge, together with all dips, spurs, and angles emanating or diverging from said lead, lode, or ledge, and also fifty feet on each side of said lead, lode, or ledge for working purposes."

Sides or walls being necessary to a lead, it follows that a statute giving to a locator fifty feet on each side of a lead for working purposes must be construed to mean fifty feet from each wall or side of the lead. The fifty feet on each side cannot include any of the lead.

Hauswirth v. Butcher, 4, 299 (1882). A claim of a mining location two thousand feet long will not protect the claimant against intervening claims of third persons for the five hundred feet more than the law allows. Whether the claim will be good for fifteen hundred feet or entirely void, undecided.

Leggatt v. Stewart, 5, 107 (1883). A location exceeding in extent the length allowed by law is void for uncertainty: "the defendants cannot claim to have sufficiently marked their boundaries if their stakes include seventeen hundred and sixty-three feet in length."

Nevada. *Overman S. M. Co. v. American M. Co.*, 7, 312 (1872). Case of dispute as to boundary of two adjoining mining claims. The court charged: "When boundaries have been established, defining and denoting the size and limits of the claim upon the surface, and for a long period have been recognized as such, the extent of the claim will be confined to the extent as manifested by such surface boundaries." The testimony was such that the instruction was apt to be understood to refer to a recognition of boundaries occurring after the consummation of the original location, and consisting merely

of the declarations of officers of the company not authorized to fix boundaries, and it was held to be erroneous.

Hanson v. Fletcher, 37 Pac. 480 (1894). The respondents included within their claim four hundred feet upon the east side line, two hundred feet upon the west side line, forty feet upon the north end line, and fifty feet upon the south end line, in excess of the amount allowed by law. This was due to an innocent mistake caused honestly by an inaccurate method of measurement, and without any intention to include a greater amount than that allowed. Plaintiff having actual notice of the location, having seen the monuments, attempted to relocate the ground. *Held*, respondents' location was valid. "We do not mean to be understood that any length, however great, in excess of the limit of the grant can be located without rendering the claim void for uncertainty. A mining claim may include so great an excess of ground as to render it absolutely void, depending upon the surrounding circumstances of each case. But what we do mean to say is, that under the particular circumstances of this case the excess within the boundaries of the Blue Rock does not render the same void."

LAND OFFICE DECISIONS.

Where the vein is developed below the surface, and the locator does not determine by any further prospecting that the nearest actual surface point is elsewhere, and the fact does not otherwise appear, the point of the vein so discovered must be assumed to be the middle of the vein for the purpose of lateral measurement under Rev. Stats. 2320. *Copp*, 231 (1878).

"The middle of the vein must be ascertained by actual exploration and development, or the discovery shaft must, for executive purposes, be taken as the middle of the vein, and the lateral measurements made therefrom." *Copp*, 276 (1880).

An applicant for patent for a lode within a placer (the existence of the lode being known at the time of the placer application) failed to file an adverse claim to the placer application, and was restricted to twenty-five feet of surface on each side of the lode. (Rev. Stats. 2333). *Shonbar Lode*, 1 L. D. 551 (1883).

The twenty-five feet referred to in section 2333 U. S. Revised Statutes is to be measured from the centre of the vein or lode. *Shonbar Lode*, 3 L. D. 388 (1885).

Following the doctrine enunciated in *Smelting Co. v. Kemp*, an application for the survey of a claim embracing several contiguous lode locations is granted. *Champion M. Co.*, 4 L. D. 362 (1886).

II. PLACER CLAIMS.

The extent of placer locations is fixed by Rev. Stats. 2330, 2331. The construction of these is thus clearly stated by the Land Office Regulations, par. 61.

"The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can

be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the regulations of the district may allow; and that from and after May 10, 1872, no location made by an individual can exceed twenty acres, and no location made by an association of individuals can exceed one hundred and sixty acres, which location of one hundred and sixty acres cannot be made by a less number than eight *bona fide* locators; and no local laws or mining regulations can restrict a placer location to less than twenty acres, although the locator is not compelled to take so much."

A placer location may be in any shape, but should conform to legal subdivisions when the land has been surveyed. Rev. Stats. 2329.¹

United States. *Smelting Co. v. Kemp*, 104, 636 (1881). A defendant in ejectment claimed adversely to the title to a placer claim derived from a patent of the United States bearing date March 29, 1879, which described the premises by metes and bounds, containing one hundred and sixty-four acres and sixty one-hundredths of an acre, more or less. *Held*, that he could not put in evidence the proceedings in the Land Department for the purpose of showing that the patent was issued upon a single application, including several mining locations, some made after the passage of the act of July 9, 1870, ch. 235 (Rev. Stats. 2330), limiting the location of one person or an association of persons to one hundred and sixty acres, and others made after the act of May 10, 1872 (Rev. Stats. 2331), limiting a location to twenty acres for each individual applicant.

A patent issued subsequently to the passage of the act of 1870 may embrace a placer mining claim consisting of more than one hundred and sixty acres, and including as many locations as the patentee had purchased. The proceedings to obtain a patent therefor are the same as when the claim covers but one location.

Tucker v. Masser, 113, 203 (1885). A patent for a placer claim, composed of distinct mining locations, some of which were made after 1870, and together embracing over one hundred and sixty acres, is valid. *Smelting Co. v. Kemp*, 104 U. S. 636, was carefully considered and again affirmed.

Gird v. California Oil Co., 60 Fed. 531 (1894). Under Rev. Stats. 2331 a placer claim located by three persons must be limited to twenty acres when it appears that they are all in the employ and acting in the interest of a single company.

California. *Mitchell v. Cline*, 84, 409 (1890). A contract between several persons to locate for their joint benefit an amount of placer mining ground exceeding the limit of twenty acres for each individual, and to pretend to satisfy the law by using the names of additional locators who would without consideration convey their in-

¹ See also Chap. XIV., Div. II.

terests to the contracting parties jointly, is against public policy, and a court of equity will not enforce a trust founded on this contract in favor of one of the contracting parties against another of them who has procured a conveyance to himself individually from one of the sham locators.

Colorado. *Poire v. Wells*, 6, 406 (1882). The restrictions upon the size of locations contained in the acts of 1870 and 1872 do not prevent one from purchasing ground located by others and adding to his own, and a patent for land so acquired is good though it exceed the limit of a location.

LAND OFFICE DECISIONS.

Several placer claims, the possessory title to which is in one person or corporation, may be patented as a single entry, provided they are not situated at wide distances from one another in different land or mining districts, but are, though not contiguous, yet in the same neighborhood. *Copp*, 78 (1870).

Where an application for patent embraces a placer location properly made and assigned to the applicant, and also additional ground claimed by virtue of a relocation by himself of the original claim enlarging its boundaries, such additional ground must not exceed the amount of twenty acres. *Knapp*, 2 L. D. 763 (1883).

Owners of contiguous locations need not present separate applications. They may be embraced in one application. (*Smelting Co. v. Kemp*, 104 U. S. 636.) *Harrison*, 2 L. D. 767 (1884).

An application for placer patent may embrace more than one location of one hundred and sixty acres. *Samuel E. Rogers*, 4 L. D. 284 (1885).

It is the intention of the mining laws generally to permit persons to take a certain quantity of land fit for mining, and not compel them to take such a quantity irrespective of its fitness for mining. *Pearsall & Freeman*, 6 L. D. 227 (1887).

III. CASES ARISING PRIOR TO THE ACT OF 1872.¹

California. *Live Yankee Co. v. Oregon Co.*, 7, 40 (1857). It was not error to refuse to charge the jury that "any claim of a definite number of feet front and running back into the hill (without any local custom to the contrary), and bounded by an older claim on one side and by vacant ground on the other, will, by implication, run parallel with the line of the older claim;" "in the absence of mining rules, regulating the subject of claims, their courses, distances, etc., the fact that a party has located a claim bounded by another claim raises no implication or inference that the last located claim corresponds in size or in the direction of its lines with the former."

English v. Johnson, 17, 107 (1860). Possibly, if several distinct claims have been consolidated into one, and the rules of the locality allow but one claim to be taken by one man, and after this consolida-

¹ See above, p. 257.

tion a person should go upon the consolidated claim to work without authority from the owner, his possession might be referred to the particular claim upon which he entered and not to the whole tract; the question might become one of intent. In the absence of any mining rule declaring that a failure to record a claim avoids it, a party may take actual possession of mineral land, though he does not observe the requirements as to the registry and like acts prescribed by the local rules. But if he takes more land than these rules allow, this would not give him title to the excess against any one subsequently entering who complies with the laws and takes up such excess in accordance with them. Where plaintiff claims under purchase and location a defined tract of which he is in possession, and there is no proof that the extent of his claim is opposed to local rules, the presumption is that his possession is rightful.

Prosser v. Parks, 18, 47 (1861). The quantity of ground that a miner may acquire by location or prior appropriation for mining purposes may be limited by the rules and regulations of the district, but not the quantity or the number of claims he may acquire by purchase.

Table Mountain Tunnel Co. v. Stranahan, 20, 198 (1862). Upon the question of reasonableness of the extent of a mining location a general custom, whether existing before the location or not, may be given in evidence; but a local rule stands upon a different footing, and is inadmissible to affect the validity of a claim acquired previous to its establishment.

Table Mountain Tunnel Co. v. Stranahan, 21, 548 (1863). In ejectment for mining claim it was error to refuse to charge, "No location of a mining claim can be so extended as to amount to a monopoly, and in the absence of local regulation prescribing a limit, recourse must be had to general usage. If the quantity of ground included be unreasonable, the location will not be effectual for any purpose, and possession under it will only be extended to the ground actually occupied. In other words, the extent of the occupancy will determine the extent of the claim, and whether the quantity be reasonable or not must depend upon the customs prevailing generally upon the subject.

Table Mountain Tunnel Co. v. Stranahan, 31, 387 (1866). Where there are no local customs or regulations in force in the district where a mining claim is located, at the time of its location, general customs then in force are admissible upon the question of the reasonableness of its extent, but not evidence of local usage and customs in different localities, varying from each other as to the size of claims located.

If the defendants in an action claim that when they took up the ground in dispute a local custom allowed them three hundred feet front for each man, and that they located to that extent, they are estopped from asserting that the plaintiff's location to the same amount before the adoption of the custom was unreasonable in size.

CHAPTER IX.

HOW MINING CLAIMS ARE HELD.—ASSESSMENT WORK.

AFTER the location of a mining claim is completed and the title thereto is vested in the locator, he retains this until a patent is issued to him, but only upon the condition that he works upon and improves the claim. This obligation is prescribed and regulated by Rev. Stats. 2324, which requires that "on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor;" and the act of Jan. 22, 1880, which in addition provides: "That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, *Anno Domini* eighteen hundred and seventy-two." The policy of these provisions is stated by Miller, J., in *Chambers v. Harrington*, 111 U. S. 350, as follows: "It is not difficult, in looking at the policy of the government in regard to its mineral lands, to understand the purpose of this provision. For many years after the discovery of the rich deposits of gold and silver in the public lands of the United States, millions of dollars' worth of these metals were taken out by industrious miners without any notice or attention on the part of the government. The earliest legislation by Congress simply recognized the obligatory force of the local rules of each mining locality in regard to obtaining, transferring and identifying the possession of these parties. Later, provision was made

for acquiring title to the land where these deposits were found, and prescribing rules for the location and identification of claims, and securing their possession against trespass by others than their discoverers. But in all this legislation to the present time, though by appropriate proceedings and the payment of a very small sum, a legal title in the form of a patent may be obtained for such mines, the possession under a claim established according to law is fully recognized by the acts of Congress, and the patent adds little to the security of the party in continuous possession of a mine he has discovered or bought.

"These mineral lands being thus open to the occupation of all discoverers, one of the first necessities of a mining neighborhood was to make rules by which this right of occupation should be governed as among themselves; and it was soon discovered that the same person would mark out many claims of discovery and then leave them for an indefinite length of time without further development, and without actual possession, and seek in this manner to exclude others from availing themselves of the abandoned mine. To remedy this evil a mining regulation was adopted that some work should be done on each claim in every year, or it would be treated as abandoned."

Representation is thus the muniment of the locator's title. Having performed the labor required for the year, his title is complete to the end of the next year. The failure to perform the requisite labor by the end of the year works a forfeiture of his claim, and it is open to relocation. Rev. Stats. 2324. But this forfeiture does not take place until the year has expired, and it may even then be cured by the performance of the work, provided no new right intervenes by the relocation of another between the expiration of the year and the performance of the work, or in the words of the act, "provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

It follows that continued possession without the necessary work will not hold the claim, nor can the original locator who has failed to do his work prevent a peaceable entry for the purpose of relocating the claim.

Resumption may however defeat relocation if made at any time before the performance of all the acts necessary to complete the location. But the resumption must be in good faith, *i. e.* the

work must be resumed with the intention of completing it and be pursued with reasonable diligence. The obligation to do annual work ceases upon the payment of purchase-money to the government and the issuance of the receiver's certificate. After that the claim cannot be relocated for failure to perform work.

It is likewise provided by this section of the Revised Statutes: "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."¹ See L. O. Regs., par. 6. This provision for forfeiture is strictly construed, and any irregularity in the proceedings will be taken advantage of to defeat it. It can be enforced only by one who was a co-owner at some time during the year when the work should have been done, and the notice must be to the owner at the time of the proceeding. And, of course, if there has been no failure, the publication of a forfeiture notice will be without effect.

Work done for the purpose of discovering minerals, no matter what the particular form or character of the deposit which is the object of the search, is within the spirit of the statute. The law makes no distinction whatever between lode and placer claims as regards the annual work necessary to the preservation of the claim to the locator thereof.²

The work may be of any character, if it be in good faith intended for the development of the claim. It need not be actually upon the surface ground or within the boundaries of the claim. It may be beyond them, but must be for the purpose of prospecting or developing the claim sought to be held. If done within the boundaries of the claim, the work will be available though it be

¹ The preservation by record of proof p. 219; Nevada, Act March 5, 1887, of delinquency and of contribution is provided for in Arizona, Act March 19, 1891, p. 136.

² See Circular, March 24, 1887, 8 L. D. p. 140; California, Act March 31, 1891, 505.

upon a vein having its apex in another claim. It need not be upon the surface, but may be beneath it. What such work may consist of may be, and has been, defined by statutes.¹

The question of good faith is one for the jury. The value of the work is a question of fact to be determined from the evidence. In New Mexico it is fixed by statute.² Actual expenditure for the labor is not the test, though it is evidence of value. The work may be shown to be worth more or less, and when there is conflicting testimony, consideration is to be given to the endeavors of the locator to comply with the law. It is also sufficient if the work be done; it is of no consequence that it is not paid for.

Performance may be excused if it is prevented by subsequent adverse claimants. This prevention may take the form of threats; but if so, in order to be an effectual excuse, they must be made on or near the ground, and be of such a character as to satisfy a man of ordinary prudence that it would be unsafe to begin work. Otherwise they must be accompanied by some overt act showing a present intention of carrying them into effect. Performance of work may also be excused in exceptional cases for some unusual natural condition rendering work useless.

"Where such claims are held in common, such expenditure may be made upon any one claim." Rev. Stats. 2324. But work upon one claim to hold claims held in common must have relation to a series of contiguous claims.³ It must be in pursuance of a system intended and adapted to develop all the claims, and not for the advantage of one only, and must equal in value the aggregate amount required by the law to hold all the claims separately. Whether the work was done for the benefit of the series of claims is a question of fact for a jury. It has been held in Montana that a placer claim of one hundred and sixty acres located by an association is a single claim within the meaning of the statute, upon which \$100 worth of labor per annum is sufficient.⁴

The act of Jan. 22, 1880, does not have a retroactive effect so as to prevent a forfeiture which has already occurred. Its effect was to extend the time for the performance of work of the

¹ Amendment of Feb. 11, 1875, to Rev. Stats. 2324; California, Act March 31, 1891, p. 219; Colorado, M. A. S. 3137; Nevada, Gen. Stats. 1885, sec. 826; Wyoming, Laws 1888, ch. 40, sec. 23.

² Comp. Laws 1884, sec. 1568.

³ The requirement that the claims must be contiguous seems to be without exception. *Gird v. California Oil Co.*, 60 Fed. 531, *post*.

⁴ See note 1 on p. 277.

then current years to December 31 of the succeeding year, so that the following years should all correspond with the calendar year and not date from the location.

Whenever there is a direct conflict between the law and the local regulations, the law must prevail; therefore neither the statute of a State nor a rule among miners of a district can authorize a less annual expenditure than \$100 or its equivalent in work in order to preserve the claim to the locator. But a rule requiring a greater annual expenditure would be valid and binding on the locator. Rev. Stats. 2324 distinctly provides that the miners may make regulations governing the amount of work necessary to hold possession of a claim, subject to the requirement that *not less* than \$100 worth of labor shall be performed or improvements made during each year.¹

The annual expenditure must continue after application for patent and until final entry; that is, until payment of the purchase-money and the issuance of a certificate, even though entry is prevented by the pendency of proceedings on an adverse claim. The expenditure after application is of importance only to prevent relocation, and if no relocation is made in the interval between application and entry, the government will not take advantage of the failure to perform annual work during that time.

In some States there are provisions for the preservation of evidence of the performance of assessment work by recording sworn statements which become *prima facie* evidence of the facts required to be stated, but do not preclude other methods of proof.²

Rev. Stats. 2324 was suspended so that no claim should be forfeited for non-performance of the annual assessment for 1893 and 1894, except in South Dakota, provided the claimant filed in the office where the location certificate was filed, a notice that he intended in good faith to hold and work his claim.³

United States. *Mt. Diablo M. & M. Co. v. Callison*, 5 Sawy. 439 (1879) C. C. D. Nev. "Work on a claim is work done anywhere within the lines upon the surface, and anywhere within

¹ Colorado, M. A. S. 3137; Washington, Montana, Pol. Code 1895, sec. 3614; Nevada, Act March 5, 1887, sec. 2, p. 136; Gen. Stats. 1891, sec. 2213; Wyoming, Laws 1888, ch. 40, sec. 23.

² Arizona, Act March 20, 1895, secs. 9 and 10, p. 55; California, Act March 31, 1893, ch. 215; Colorado, M. A. S. 3161; Idaho, Act March 5, 1895, sec. 6, p. 26; Montana, Pol. Code 1895, sec. 3614; Nevada, Act March 5, 1887, sec. 2, p. 136; Oregon, Hill's Ann. Laws 1892, sec. 3830; Wyoming, Laws 1888, ch. 40, sec. 23.

³ Act Nov. 3, 1893, ch. 12, 28 Stat. 6; Act July 18, 1894, ch. 143, 28 Stat. 114.

those lines below the surface where they are carried down vertically into the earth." Work below the surface within the lines of the claim, though upon a vein whose apex is in another claim, will hold the claim in question. Work done outside of a claim, for the purpose of prospecting or developing it, is as available for holding the claim as if done within its boundaries. The owner of several contiguous claims may form one general system adapted and intended to work them all, and in such case work in furtherance of the system is work on all the claims intended to be developed by it.

North Noonday M. Co. v. Orient M. Co., 1 Fed. 522 (1880), C. C. D. Cal. The statute requires \$100 worth of work on each claim located after May 10, 1872, in each year, and in default thereof authorizes the claim to be relocated by other parties, provided that the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, and before any relocation is made, he thereby preserves his right to the claim; and no other person has any right to relocate after such resumption of work in good faith by the first locator, even though the latter has failed to perform any work for the period of one year or more immediately before he resumed work.

Belk v. Meagher, 104, 279 (1881), affirming s. c. 3 Mont. 65 (1878). By the act of May 10, 1872 (Rev. Stats. 2324), and the acts amendatory thereof, the rights of the original locator or his assignee of a mining claim which was located prior to that date were continued until Jan. 1, 1875, although no work had been done thereon, provided that no relocation thereof had been made; and they were thereafter extended, if within the year 1875, and before another party relocated the claim, work had been resumed thereon to the extent required by law. When, therefore, work was so resumed, such a claim was not opened to relocation before Jan. 1, 1877, although no work had been done upon it during the year 1876.

Smelting Co. v. Kemp, 104, 636 (1881). Labor and improvements, within the meaning of the statute, are deemed to have been put on a mining claim, whether it consists of one or more locations, when the labor was performed or the improvements were made for its development, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, or may be at a distance from the claim.

Slavonian M. Co. v. Perastich, 7 Fed. 331 (1881), C. C. D. Nev. The amendment of Jan. 22, 1880, to Rev. Stats. 2324 is not retrospective, and will not save a claim from forfeiture incurred before the passage of the act. The locator has the entire year within which to perform the work, and there can be no relocation until the expiration of that time. Such a relocation is a trespass, and will not be validated by the original locator's failure to perform his work.

Threats by such a relocater that he would shoot the original locator if he attempted to resume the work, made at the distance of one-half mile, and seven miles from the claim, are not sufficient to excuse performance. "Words, unaccompanied by any overt act showing a present intention of carrying them into effect, even on the ground, would hardly justify the plaintiff in declining to make some effort to work.

But unless the threats were made on the ground, or so near as to amount to the same thing, they certainly ought not to have that effect." "I will not say that there may not be threats on the ground, unaccompanied by acts, of so serious and menacing a character as to satisfy a man of ordinary prudence it would be unsafe to begin work, and in such case it might be an excuse for non-performance. But that is not this case."

Jupiter M. Co. v. Bodie Con. M. Co., 11 Fed. 666; s. c. 7 Sawy. 96 (1881), C. C. D. Cal. If the first locator resumes work at any time after the expiration of the year and before any relocation is made, he thereby preserves his claim. The statute nowhere authorizes a trespass upon or a relocation of a claim located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

Where one person or company owns several contiguous claims capable of being advantageously worked together, one general system may be adopted to work them. Work done in accordance with such a system, although done on only one of such claims, or even outside of them all, is available to hold all such contiguous claims intended to be embraced in the system.

Jackson v. Roby, 109, 440 (1883). The act permitting expenditure upon one only of several claims held in common contemplates that this expenditure is to be made for the common benefit, and that one enjoying a mining claim defined by metes and bounds does not, by expending money upon a flume which passes over adjoining land, and deposits the waste from his mine on that land without benefit to such adjoining land, and without other evidence of a claim to it, thereby make an expenditure upon his claim within the meaning of the Revised Statutes. "It often happens that for the development of a mine upon which several claims have been located, expenditures are required exceeding the value of a single claim, and yet without such expenditures the claim could not be successfully worked. In such cases it has always been the practice for the owners of different locations to combine and to work them as one general claim; and expenditures which may be necessary for the development of all the claims may then be made on one of them. The law does not apply to cases where several claims are held in common, and all the expenditures made are for the development of one of them without reference to the development of the others. In other words, the law permits a general system to be adopted for adjoining claims held in common, and in such case the expenditures required may be made, or the labor be performed, upon any one of them." Field, J.

Chambers v. Harrington, 111, 350 (1884), affirming s. c. 3 Utah, 94 (81). When several adjoining claims are held in common, work for the benefit of all, done upon any one of them in a given year to an amount equal to that required to be done upon all in that year, meets the requirements of Rev. Stats. 2324. The language of the court in *Jackson v. Roby*, 109 U. S. 440, cited and approved.

This clause of the above section "shows that one meaning of the

phrase 'held in common' is where there are more owners of the claim than one, while the use of the word 'claims' held in common, on which work done on one of such claims shall be sufficient, shows that there must be more than one claim so held, in order to make the case where work on one of them shall answer the statute as to all of them." Where several claims are held in common, it is in the line of the policy adopted by the government in regard to annual work to allow the necessary work to keep them all alive to be done on one of them. "But obviously on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such case the claims must be contiguous, so that each claim thus associated may be in some way benefited by the work done on one of them."

"In the case before us the appellees became successively owners of three claims contiguous to each other, supposed to be located on the same lode. These were, first, the Parley's Park claim; second, the Central; and third, the Lady of the Lake. They continued their work on the Parley's Park claim from 1872 until July 19th, 1878, when they transferred it to the Lady of the Lake claim, and did no more work on the other until September 13th, 1879, when one Cassidy, claiming that the Parley's Park claim was forfeited for want of work on it for more than a year, located a mining claim called the 'Accidental,' which embraces the premises in dispute, and which is part of the Parley's Park claim.

"This claim of Cassidy — the Accidental — is the one on which appellants, who became its owners, now rely, and if the work done on the Lady of the Lake is not work done in common on the three claims of appellees, within the meaning of the statute, the claim of the appellant must prevail.

"The finding of facts by the court below on that point is as follows:—

"5th. That during the year beginning on the 19th of July, 1878, the owners of the Parley's Park claim were also the owners of two certain claims, called respectively the "Central" and "Lady of the Lake" — the Central adjoining the Parley's Park and the Lady of the Lake adjoining the Central mining claim — and that, with a view to the future working and development of all three of said claims, the owners thereof located what is called the "Main Shaft" in the Lady of the Lake surface ground. That said shaft is in such proximity to said Parley's Park mining claim that work in it has a tendency to develop said claim, and said shaft was located and intended for the purpose of developing all of said claims.

"I find that during said last-named year, work was prosecuted in said shaft, and by improvements made thereat exceeding in value \$300, and of not less than \$2,000 in value. No work was done in said year after July 19th, 1878, and prior to the 15th day of September, 1879, in Parley's Park surface ground, or within its limits, by the owners thereof."

"We are of the opinion that this brings the case clearly within the principles we have laid down, and the work was effectual to protect the Parley's Park claim against an intruder."

Lakin v. Sierra Buttes Gold M. Co., 25 Fed. 337 (1885), C. C. D. Cal. One who has forfeited his claim by a failure to work it as required by the statute may re-enter and resume work at any time before other rights attach in favor of subsequent locators.

Aurora Hill Con. M. Co. v. 85 M. Co., 34 Fed. 515 (1888), C. C. D. Nev. An applicant for a patent to a mining claim who has made final entry, has paid the purchase-money for the land embraced in the survey of the claim, and has obtained his certificate of purchase therefor, is not obliged to continue the annual expenditure upon the claim required by Rev. Stat. 2324 pending final decision upon his application.

Benson M. Co. v. Alta M. Co., 145, 428 (1892). After application for patent and payment of purchase-money to the government, and the issuance of certificate of purchase, there is no obligation to do further annual work, and the claim cannot be relocated for failure to do so. Obviously Rev. Stats. 2324 does not provide for the acquisition of title to the land. It refers to the amount of work necessary to hold possession of a mining claim, "by which is meant to continue the mere possessory title."

Billings v. Aspen M. & S. Co., 51 Fed. 338 (1892), C. C. Ap., 8th Circ. It seems that a sale of a co-tenant's interest for default in payment of his share of annual expenditure is of no effect when he was dead, his co-locator had knowledge of his death, and notice was not addressed to his heirs.

Turner v. Sawyer, 150, 578 (1893). The provisions of Rev. Stats. 2324 for the forfeiture of the rights of co-owners for failure to pay their share of annual expenditure must be strictly construed. To entitle him to enforce such a forfeiture, one must be a co-owner at some time during the year for which the work was done. In Colorado, one who acquired an interest in a mining claim by purchase at a sheriff's sale in 1884, but to whom the sheriff did not deliver a deed until 1885, may not enforce a forfeiture for work of 1884.

Book v. Justice M. Co., 58 Fed. 107 (1893), C. C. D. Nev. The running of a tunnel for the purpose of prospecting, developing, and working two separate claims owned by the same person, though partly outside of both claims, is to be credited to both; and if the necessary amount of work is done, there is a sufficient compliance with the law.

The object of Nev. Stats. 1887, p. 136, sec. 2, is to prescribe a definite way in which proof of performance of work may be obtained, but it does not prevent the making of proof in any other way. The record is *prima facie* evidence of the facts stated therein, but failure to comply with the act does not work a forfeiture.

Oscamp v. Crystal River M. Co., 58 Fed. 293 (1893), C. C. Ap., 8th Circ. Mere failure during one year to perform the annual work required by Rev. Stats. 2324 does not divest title to a mining claim in favor of a junior overlapping location which is not thereafter relocated, and the resumption of work on the senior claim in the succeeding year restores to its owner all his original rights.

"The failure of the owner to occupy or to work his claim during a given year will not operate to divest him of his title and to confer it

upon another. A failure to work a claim to the extent required by the statute simply entitles a third party to relocate it in the mode pointed out by existing laws."

Actual possession is not necessary to protect the title to a well-located mining claim. It is not of that precarious character for the reason that it is not exclusively dependent upon possession, but rests upon a statutory grant. The position of an overlapping junior locator is no better than that of any third party.

Gird v. California Oil Co., 60 Fed. 531 (1894), C. C. S. D. Cal. Eighty claims, embracing between eight thousand and nine thousand acres widely scattered over many miles of territory, through which were many mountain ranges and cañons, by sundry conveyances and leases vested in one person. These were located and worked for oil. It was contended that they constituted a consolidated claim, the working of which could be best done by one agency and pursuant to one general system, and that the expenditure upon such general system might be apportioned among all the claims, although work was not actually done on some of them. It was *held*, however, that this rule only applied to blocks of contiguous claims; and that work done on one claim in pursuance of a general system of development would not hold another claim not contiguous thereto. No exception to the rule is allowed in the case of oil claims, although the nature of that substance is such that a well sunk upon one claim might drain land at a great distance therefrom.

Failure to do annual work is not excused by threats where they have no application to the claim, but arises from a difference between the parties on an entirely distinct matter.

McGarrity v. Byington, 12, 426 (1859). Work done outside of a mining claim with intent to work the claim, to be considered by intendment as work done on the claim, must have direct relation and be in reasonable proximity to it.

Bradley v. Lee, 38, 362 (1869). Where a mining rule requires a certain amount of labor to be done on each set of claims annually, and does not limit the extent of the claims, labor performed on one set of claims is sufficient to hold for one year all the contiguous sets of claims owned by the same party.¹

Original Co. v. Winthrop M. Co., 60, 631 (1882). In ejectment for a mining claim which was located prior to May 10, 1872, the court charged that the locator of the claim must observe not only the act of May 10, 1872, requiring \$10 worth of labor or improvements per annum for every one hundred feet, etc., but also the regulation of the district requiring "that work shall be done every sixty days on the claim." *Held*, error. There was a clear conflict between the law and the regulations, and the law must prevail.

Belcher Consolidated Gold M. Co. v. Deferrari, 62, 160 (1882). Plaintiff having expended in labor on two claims \$100 in 1880, and in January, 1881, resumed work and expended \$24 before defendant's entry and location in August, 1881, he is within the protection of Rev. Stats. 2324, and has not forfeited his rights.

¹ The rule laid down in this case is the amount of work is equal to \$100 for applicable at the present time, provided each claim.

Carney v. Arizona Gold M. Co., 65, 40 (1884). The provisions of Rev. Stats. 2324, as to annual work and relocation for failure to perform the same, apply to placer claims as well as to lode or vein claims.

Du Prat v. James, 65, 555 (1884). The failure of a locator of a mining claim to perform the amount of labor required by the laws of the United States subjects the claim to relocation, and peaceable entry in good faith may be made for that purpose, although the claim be occupied by the original locator. The right of the original locator to perform the required amount of labor after such failure and retain the benefit of his location is dependent upon the performance of the labor before the relocation.

Personal expenses incurred and the value of the locator's time in endeavoring to procure water to operate a mill to crush ore from the mine, cannot be considered as work done on the claim.

Pharis v. Muldoon, 75, 284 (1888). Where a mining claim has become subject to relocation, the resumption of work thereon by the original locator, after a notice of relocation has been posted thereon, but before the relocater has marked the boundaries of his location, is sufficient to prevent the original location from lapsing. "The marking of boundaries is a necessary part of the location . . . the defendant had resumed work 'after failure and before location.'"

DeNoon v. Morrison, 83, 163 (1890). The owner of two mining claims held in common has the right to do annual work, necessary for the protection of both claims, on one; the question whether the work was intended for the benefit of both and tended to develop both is one of fact for the jury. A party making such expenditures is not required to prove title to the claim upon which the work was done if the title is not in dispute. It is sufficient to prove actual possession and improvement of such claim from which the law presumes ownership.

Richard v. Wolfing, 32 Pac. 971 (1893). A. having located a mining claim, shortly afterwards a patent was issued to S. for the south half thereof as agricultural land. All the work done by A. upon the mine was done on this southern part, and he obtained from S. a conveyance of the latter's title thereto. As against a third person seeking to relocate a part of the ground, A.'s location was valid.

Mills v. Fletcher, 100, 142 (1893). Where plaintiff had made a lawful location of a claim, and done the annual work thereon for 1889, and defendant entered thereon in 1890, attempted to make a new location and held exclusive possession thereof during that year, the latter may not set up as a defence to an action of ejectment the failure of the plaintiff to perform the work for 1890. The plaintiff had the entire year within which to do this work, and the defendant's entry was wrongful and his adverse possession excused the plaintiff as against him.¹

Quigley v. Gillett, 101, 462 (1894). Where an adverse claimant sets up a title based on a location subsequent to that of the applicant for patent, the burden is upon such claimant to prove that the applicant has forfeited his right by failure to perform the annual work.

McCormick v. Baldwin, 104, 227 (1894). A party cannot hold a mining claim for several years without doing, in any year, the amount

¹ See also *Trevaskis v. Peard*, 44 Pac. 246 (1896).

of work required, by simply going on it at the beginning of each year and doing a few hours' work with no *bona fide* intention to comply with the requirement as to the amount of work to be done. To "resume work" within the meaning of Rev. Stats. 2324 is to actually begin work anew with a *bona fide* intention of prosecuting it as required by said section.

Sweet v. Webber, 7, 443 (1884). The provisions of Rev. Colorado. Stats. 2324 as to annual expenditure apply alike to lode and placer claims. Neither a rule of miners nor a statute of a State can authorize a less annual expenditure than \$100, without being in conflict with law of the United States and therefore void.

McGinnis v. Egbert, 8, 41 (1884). The law as to affidavits of labor performed on a location (M. A. S. 3161) fixes a limit beyond which the privilege of preserving the evidence by an *ex parte* affidavit is cut off, but requires no time to elapse after the work is done before the affidavit may be recorded. It is not an objection to an affidavit that it includes more than one claim.

If work is resumed on a claim after it has been open to relocation, but before relocation is actually made, the rights of the original locators stand as they would if there had been no failure.

Quimby v. Boyd, 8, 194 (1884). The amount paid for the labor is not conclusive that work of that value has been done, but the actual value of the work is the true test whether the law has been complied with. Where the testimony as to value is conflicting, it is proper to consider whether there has been a *bona fide* attempt to comply with the law.

Hall v. Hale, 8, 351 (1885). The act of Congress, Jan. 22, 1880, is not retroactive so as to divest a right already acquired under existing laws. It operated as an extension of the time within which such annual labor must be performed. One who previous to the passage of the act was entitled to the time until June 8, 1880, thereby became entitled to the rest of the year 1880 within which to perform his annual labor.

Pelican & Dives M. Co. v. Snodgrass, 9, 339 (1886). One who makes a discovery of mineral, and runs a tunnel thereon, and does no other act towards completing the statutory location, and for four years does no labor thereon, acquires no interest as against intervening rights. Nor can he after the four years perform the remaining acts necessary to a complete location, and have them relate back to the date of the original discovery, there being intervening rights.

Consolidated Republican Mountain Mining Co. v. Lebanon M. Co., 9, 343 (1886). The testimony as to the custom of a mining district in reference to requirements of work on claims twenty years before the trial being conflicting, it was held that such work was necessary on the ground that all miners' regulations and customs made development work or actual occupancy a condition of retention of a claim.

Bryan v. McCaig, 10, 309 (1887). In an action between claimants of a mining claim there was evidence to show that an ore-house built on the claim by the defendant was placed there for the use and benefit of another claim, and the court submitted to the jury the question of good faith and intention of defendant to make an improvement on the claim in question. *Held*, not error. To make it an improvement

under the law requiring labor, it must have been placed there with the purpose of benefiting and improving the particular claim. Evidence that annual labor was not performed is admissible, though not pleaded specially in an action on an adverse claim.

Doherty v. Morris, 11, 12 (1887). Any neglect to do the assessment work on a mining claim is not excused by the failure of one of the joint owners to do such work under a promise to his co-owners that he would do so. A valid relocation by another on account of such neglect is not affected by such understanding between the original owners. In an action on an adverse claim, the fact that one of the original owners conspired with the person who relocated the property as an abandoned lode to make default on the assessment work, is immaterial, when as a matter of fact the work was not done.

McGrath v. Bassick, 11, 528 (1888). The issue being whether the defendant had in 1882 performed the required annual labor, he testified that he and his hired man had worked on the mine seventeen days and had expended eight dollars besides. The current wages of miners were three dollars per day, but there was evidence to show that defendant and his man did more work in the same time than the ordinary miner would perform. The testimony as to the character of the material removed, and the ease or difficulty with which the work might have been done, was conflicting. Under this evidence a verdict for the defendant would not be set aside as manifestly against its weight.

Doherty v. Morris, 17, 105 (1891). "Labor performed by the owner of a mine in constructing a wagon road thereto for the purpose of better developing and operating the same, may be treated as a compliance with the law relating to annual assessment work thereon." Where such a road is built to two different claims, and the owner of one contributes toward the expense thereof a sum equal to the requisite amount of annual expenditure, it is a compliance with the law.

Hall v. Kearny, 18, 505 (1893). When a locator, claiming a right by reason of the failure of the original locator to do annual work, has established that no work was done upon the claim, the burden of proof is upon the original locator to prove an allegation that work done outside the lines of the claim was intended as the annual work therefor, and was of such a character as would inure to the benefit thereof.

Such work may be considered as annual work to hold the claim, although done upon patented ground. This latter fact is immaterial except to throw light on the intention of the one doing the work.

Kramer v. Settle, 1 Idaho, 485 (1873). Being requested to Idaho. instruct jury that "work done outside of a mining claim, and with direct reference to the claim, may be considered as work done on the claim," to this the court added the qualification, "The evidence of such work having been done should be received with great caution, and it should appear clearly that such work was intended for the improvement of such claim and no other." *Held*, not error. The failure to perform the \$100 worth of work on a mining claim required by the law of the State within six months after record amounts to an abandonment, and it may thereafter be appropriated by another. The performance of the work before such subsequent location will not cure the failure.¹

¹ This case arose before the passage of the act of 1872.

Lockhart v. Rollins, 2, 505 (1889). Where the mine was idle, the labor of a watchman and custodian was labor within Rev. Stats. 2324. It is immaterial that he had not yet been paid.

Montana. *Herbert v. King*, 1, 475 (1872). No regulations or customs of the district having been proven, the plaintiff introduced evidence which tended to show that the ground was unrepresented for five or six weeks, and that it thereby became subject to relocation and was relocated by third parties, who worked it out, unmolested by him, with his knowledge and without assertion of title by him. These facts raise a presumption of the right of relocation and establish an abandonment.¹

Moxon v. Wilkinson, 2, 421 (1876). Erecting and occupying a house on a claim for a residence, and another for a blacksmith shop, is not a compliance with the law.

Belk v. Meagher, 3, 65 (1878), affirmed in 104 U. S. 279. Under provision of Rev. Stats. 2324, as to claims located prior to May 10, 1872, representation is a muniment of title. The locator has one whole year in which to make the representation, and having made one representation he has the whole of the next year in which to make the next. And there can be no forfeiture until the full time expires. Where a forfeiture does take place, no rights are acquired by one who made a relocation previous to the expiration of the year, and therefore before the forfeiture and while the original locator's property in the land was still alive.

Gonu v. Russell, 3, 358 (1879). A locator of a quartz lode having forfeited the same by reason of failure to perform the necessary labor, another entered upon the ground on July 3, 1877, posted a notice describing the claim by boundaries on July 19, and marked the boundaries and recorded the claim on July 20. On July 19, one hour before the marking of the boundaries the original locator resumed work. His title was held to be good. "The law contemplates that the location of a mining claim shall consist of a number of distinct acts, which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists. The owner of a lode which has become subject to relocation can resume work thereon at any time prior to the performance of *all these acts*. The appellant could not make a valid location of the E. lode until he had marked the boundaries, so that they could be traced readily by means of stakes, monuments, natural objects, or any other certain means. The resumption of labor in good faith by the respondent before the appellant perfected his location rendered null the prior acts of the appellant."

Remington v. Baudit, 6, 138 (1886). The annual work required by Rev. Stats. 2324 to be performed in order to retain a mining claim must be done either within the boundaries of the claim, or if outside of them as a necessary means of extracting ore from the claim. The erection of a dwelling-house outside the boundaries for the convenience and shelter of miners cannot be considered as a part of such work.

¹ This case goes upon the principle that a man who will not protect his own and wilfully allows another to appropriate it, without even interfering with the trespasser or asserting his title, must be regarded as having abandoned it. But it must not be overlooked that this was decided before the act of 1872 went into effect.

Honaker v. Martin, 11, 91 (1891). The resumption of labor after failure to do assessment work and before relocation, in order to save the claim from relocation under Rev. Stats. 2324, must be followed by a prosecution of the work with reasonable diligence, until the requirement as to labor has been complied with. "The resumption of work by the original locator, whose rights are subject to forfeiture, without the expenditure, with reasonable diligence, during the year, of the sum of \$100 for labor or improvements upon the mine, is an evasion of the statute."

It was held that upon the facts of this case there was not a resumption of work in good faith.

Coleman v. Curtis, 12, 301 (1892). It is not necessary that labor done upon a claim should be paid for in order to be effectual as assessment work. It is sufficient if *labor of the requisite value* be done whether paid for or not, the payment being a matter between the laborer and the locator.

Section 1483 of div. 5, Comp. Stats., merely provides a method of preserving *prima facie* evidence of the annual representation of mining claims. It does not relate to the effect of doing the work or of making the improvements required by law.

Mattingly v. Lewisohn, 13, 508 (1893). In estimating the amount of work or improvements, the test is the reasonable value thereof, not what was paid for it or what the contract price was.

McDonald v. Montana Wood Co., 14, 88 (1894). Where a placer claim of one hundred and sixty acres is located by an association, \$100 worth of work is sufficient to hold the entire claim. It is not necessary to do \$100 worth of work for each twenty-acre tract.¹

A mere trespasser cannot set up a forfeiture for failure to do annual work. Such a forfeiture must be pleaded, and there must be a relocation by some one on account thereof.

Brundy v. Mayfield, 15, 201 (1895). The forfeiture provisions of Rev. Stats. 2324 must be strictly construed. Before the interest of a part owner of a mining claim can be forfeited to his co-owners, it must be a fact that he has failed to contribute his proportion of the annual expenditure required by law. If he has not failed to do this, the publication of forfeiture notices will not affect his title.

Hirschler v. McKendricks, 16, 211 (1895). Plaintiff located his claim on Jan. 1, 1889, and failed to do the requisite annual work in 1889 and 1890. He resumed work on the night of Dec. 31, 1890, and continued work until Jan. 15, 1891, doing less than \$100 worth. He then ceased. It did not appear that he was obliged to do so by the weather or any other reason, and defendant located the land on Jan. 31, 1891. It was held that plaintiff, although having resumed work, did not prosecute it with reasonable diligence, and the defendant's location was therefore good.

Reasonable diligence was not shown by the posting of a notice soliciting proposals for \$500 worth of work with a view to obtaining a

¹ While there is no other decision on this question, this case must be treated as doubtful. It has been disregarded by the Land Department upon a collateral question. If this construction is put upon the law, it will open an easy road to evade the purpose of the act.

patent, and negotiations with persons with a view to making such a contract. It was not shown when this notice was posted or when the negotiations took place. A diligent attempt to procure the performance of work might, under proper circumstances, be due diligence in resuming work, but this is not such a case.

Davidson v. Bordeaux, 15, 246 (1895). A recorded affidavit of the performance of the annual work is not required, and when made it is only *prima facie* evidence. The fact of the performance of the work may be proved by other evidence.

Deno v. Griffn, 20, 249 (1889). After payment of money **Nevada.** for obtaining a patent and issuance of the receiver's receipt, the locator is not required to perform assessment work.

Lacey v. Woodward, 25 Pac. 785 (1891). Plaintiff **New Mexico.** located his claim on Jan. 1, 1883. He did the assessment work for 1884 and 1885. In 1886 he did not perform the required work. In 1887 he in good faith resumed work, and did the work for that year, and continued in possession until February, 1888, doing the work for that year. Defendants entered in the fall of 1888, and the land was held not to be open to relocation. The rule was laid down that if plaintiff failed to do the work for one year, and resumed work in good faith before a location by defendants, the latter's location was invalid.

Thompson v. Jacobs, 3, 246 (1883). The first annual expenditure upon mining claims required by the act of Congress, **Utah.** May 10, 1872, to be made upon claims located prior to its passage, must be made after its passage and before Jan. 1, 1875. Expenditure made before May 10, 1872, in compliance with a local mining regulation, is not a compliance with the act.

Utah M. & M. Co. v. Dickert & Myers Sulphur Co., 6, 183 (1889). Where adverse possession of a mining claim is taken and held wrongfully, the rightful owner is excused from doing the assessment work during the continuance of such adverse holding.

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The co-owners of a tunnel, who have made the required expenditure, may proceed against delinquent co-owners in the manner provided by Rev. Stats. 2324. *Copp*, 222 (1878).

Annual work upon lode claims must continue to date of entry and payment. The pendency of proceedings in court upon an adverse claim does not release the applicant from this requirement. *Colo. Central v. American Flag*, *Copp*, 255 (1879).

The local laws may prescribe a greater annual expenditure than the United States law requires, but not a less. *Wildman Quartz Mine*, *Copp*, 291 (1880).

Where a claim was located Oct. 1, 1879, and one hundred dollars' worth of labor and expenditure was made after location and before Jan. 1, 1880, it cannot be considered as annual expenditure under sec. 2, act of Jan. 22, 1880. That expenditure must be made during the calendar year 1880. *Copp*, 295 (1880).

"Persons in possession of lodes (within Sutro Tunnel Grant) at the

time of the grant need not conform to the requirements of the mining laws of the United States as to the performance of annual labor. A compliance with the local mining rules and regulations prescribed by the legislature of Nevada, if any there be, is sufficient for the purpose of maintaining the possessory right to such lodes." *Sutro Tunnel Co.*, Copp, 302 (1881).

Where local law requires annual expenditure on placer claims, failure to make such expenditure subjects the claim to relocation. But where no relocation has been made, it is of no consequence whether work has been done since application for patent or not. *J. P. Sears*, Copp, 312 (1881).

Co-tenants who are alleged to be delinquent, and who have forfeited their rights under Rev. Stats. 2324, even when in fact they are not so, must protect their rights by filing adverse claims. *Grampian Lode*, 1 L. D. 544 (1882).

A claim is not subject to relocation in the interim between entry and issuance of patent for failure to perform annual work. *Harrison*, 2 L. D. 767 (1884).

When the parties owned two adjoining claims, and a drift in one of them was run in the direction of the other, under the advice of mining experts, with a view to the improvement of both, it is available to hold both. *McNeil v. Pace*, 3 L. D. 267 (1884).

When application is made for a patent upon a placer mining claim embracing several locations, an adverse claimant may prove abandonment of any one of such locations by failure to make annual expenditure upon it or upon a common claim for its benefit, and the possessory right will fail even though the adverse claimant may not show in himself a good adverse title by reason of a like failure. *Good Return M. Co.*, 4 L. D. 221 (1885).

In a claim located after May 10, 1872, failure to make the annual expenditure required by the statute renders the claim subject to relocation in the same manner as if no location of the same had ever been made, provided that work has not been resumed thereon after such failure, and before relocation. *Little Pauline v. Leadville Lode*, 7 L. D. 506 (1888).

Where several claims are embraced in one application, the annual work required by statute may be done on one of such claims for the common benefit of all. *Nichols v. Becker*, 11 L. D. 8 (1890).

The burden of proof is upon the owner to show that such work is a part of a general scheme of improvement, and develops the claim as a whole. *Dolles v. Hamberg C. M. Co.*, 23 L. D. 267 (1896).

The B. Co. made application for patent, and furnished all the evidence necessary to entitle it to make entry, but through an oversight failed to pay the sixty-five dollars which under Rev. Stats. 2325 should have accompanied the application. Under belief that its entry was complete, it suspended, and failed for two years to do the annual labor required by the law. The claim was then relocated by one who applied for patent. The company discovering its default, tendered the sixty-five dollars, which was refused, on account of the intervening claim. *Held*, that the claim had been abandoned, and was open to relocation. *Ferguson v. Belvoir M. & M. Co.*, 14 L. D. 43 (1892).

CHAPTER X.

LOCAL MINING RULES AND REGULATIONS.

PRIOR to 1866 no law was enacted by Congress providing for the sale of the public mineral lands or regulating mining thereon. This gave rise to a phenomenon unique in the history of American law. During the interval between 1849 and 1866 there grew up and was established a common law of mining, — a law created and enacted by the miners themselves, which was almost at once recognized as a part of the law of the land and has since received the endorsement of legislative action. This law is the code of mining rules, regulations, or customs in force in each of the different districts. The system had its origin in the early mining camps of California, and the example there set was followed by all the miners on the public domain. The lands in which large deposits of the precious metals were found upon the Pacific slope were the property of the United States, were unsurveyed, and not open by the law to settlement. These the miners penetrated, explored, and developed. Their right to do so, and the title they acquired by engaging in mining upon the public domain, have been considered. But they found there no law to govern them in any of their relations. They accordingly assembled in miners' meetings, and there enacted codes of law for their government. For this purpose the country was divided into districts, each having its own set of district regulations or customs. These rules were generally in writing, and they bore a marked similarity in their provisions. They usually first defined the name and boundaries of the district; secondly, the number and kind of officers to be elected from time to time; and then fixed the extent and number of the claims that might be located, the qualifications of the locator, the manner of designating the claim — generally by posting and recording a notice — the amount of work required to hold the claim; and sometimes established a judicial system for the trial of causes and the enforce-

ment of the regulations. Their differences were those that arose from the extent and character of the mines and the kind of mining carried on in the different districts. But they all recognized *discovery* followed by *appropriation* as the foundation of the possessory title, and *development* as the condition of its retention. The California Practice Act of 1851, sec. 621, provided that proof of "the customs, usages, or regulations established or in force at the bar or diggings embracing such claims" might be given in causes regarding them in justices' courts, and "when not in conflict with the constitution and laws of the State should govern the decision of the action."¹

But this effect, indeed, was given to them in all the courts, not only in California, but of the other mining States. They were the law by which, prior to 1866, the rights of conflicting claimants were determined; and the kind of property created by them found judicial recognition in the Supreme Court of the United States in *Sparrow v. Strong*, 3 Wall. 97.

The act of Congress of July 26, 1866, gave the sanction of law to these miners' rules so far as they were not in conflict with the laws of the United States. Section 1 of that act was as follows: "The mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the law of the United States."

Subsequent legislation specified with greater particularity the manner of location and appropriation and the extent of each mining claim, recognizing, however, the essential features of the rules framed by miners, and among others those which made discovery and appropriation the basis of title, and required work on the claim for its development as a condition of its ownership. The sections of the Revised Statutes now in force recognizing these regulations are sections 2319, 2320, and 2324.

Until 1872 there was no limit to the power of miners' meetings to legislate, except the general principles of the law and the acts of the State and Territorial legislatures. But the act of 1872 has

¹ See Code Civ. Proc. 1885, sec. 748.

superseded all the provisions of mining regulations upon all those subjects upon which it has made distinct provision, and the importance of these rules has been in consequence much diminished. It is, however, still competent for the mining districts to make regulations subject to the restrictions of the act. They may, within the limits prescribed by the act, fix the extent of claims; they may determine whether or not claims shall be recorded, whether and what posting of notice shall be done; they may make additional requirements in the manner of location, of marking boundaries and the like, and as to the amount of work.¹ Beyond this they cannot now go. Their scope is confined to the regulation of the location and working of mining claims. And with reference to these they may only govern the rights of miners as between themselves. They cannot be invoked as against the government or the owner in fee of land, though he holds by patent from the government. Nor have they any effect against the occupants or owners of ground not the subject of mineral appropriation.

Regulations must be reasonable in themselves, and not in conflict with the laws of the United States or with those of the State or Territory in which the district is situated.² If they are so, they are of no effect. Generally they are of binding force, but the act of Congress must not be construed in subordination to them. A patentee, for example, cannot by force of them acquire a greater estate than is by the law of the United States given to him. And a regulation of the amount of work necessary to hold a mining claim which is inconsistent with the requirements of Rev. Stats. 2324, or which fixes a less annual expenditure than that section, is entirely void. Rules imposing burdens or obligations in addition to those imposed by the act must be clear and positive, and not rest on inference or presumption.

While the mining districts may enact regulations, they are not bound to do so, and in the absence of proof it will not be presumed that they have done so. If they have not done so, a compliance with the law of Congress and of the State will secure the

¹ Arizona, Rev. Stats. 1887, sec. 2349; Oregon, Hill's Ann. Laws, 1892, sec. 3832; Washington, Gen. Stats., secs. 2210, 2211, 2213; Wyoming, Laws 1888, ch. 40, secs. 1-3; Montana, Code Civ. Proc. 1895, sec. 1331.

² Oregon, Hill's Ann. Laws 1892, sec. 3832; Utah, 2 Comp. Laws 1888, sec. 3472, p. 324; Washington, Gen. Stats. 1891, sec. 2213; Wyoming, Laws 1888, ch. 40, secs. 1-3.

claim to the locator. To have the force of law, a regulation must be in force at the time of the location. It does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It likewise becomes void by disuse; this disuse, however, must be general: it is not sufficient that the rule has been disregarded or violated by a few persons. Whether it has so fallen into disuse is a question of fact. To satisfy the Land Department of such disuse, an applicant for a patent, it seems, must show that it is without exception. A locator, therefore, who intends to apply for a patent should not treat a regulation as obsolete if it is at all regarded.

Where a regulation has fallen into disuse, a custom reasonable in itself and generally observed, though contrary to the regulation, may be proved. But the written rules are presumed to be in force, and proof of a contrary custom must be clear. A witness may not be asked if he knows of a custom to prevent what the written rule prescribes,—at least, before the rule has been shown to have fallen into disuse. The existence of mining regulations is a fact, and must be proved as a fact whether in court or in the Land Office. Judicial notice will not be taken of them. Upon the person relying on them lies the burden of proving them. This is done by producing the original rules when in writing. They are generally deposited with some public officer, as the county recorder. When it is proved that rules were adopted and recognized, they become admissible in evidence. The fact that the meeting at which they were adopted was held upon a day different from that named in the notice thereof, does not, in the absence of fraud, render them inadmissible. And an alteration in one article of regulations after their adoption does not change the legal effect of the other articles.

When it is sought to prove regulations by copy, it should be shown that the copy comes from the proper depository, and that he is empowered to certify copies so that they may become evidence. Neither these things nor the fact that such regulations prevailed in the district can be shown by the certificate itself or by other *ex parte* proof.

When the written regulations are deposited with some authorized officer, or recorded in his office, they may not be proved by parol evidence. Other evidence, however, besides proof of the

written record or of the acts of a miners' meeting is admissible as tending to prove the existence of a particular rule. This may be done by establishing a custom or usage in the district. The custom of recording claims in a district, while not proving absolutely the existence of a rule requiring such a record, tends to establish it. So on a subject as to which the written rules, when proven, are silent, a custom prevailing in the district may be proved; but regulations or customs of another district are not admissible to vary such a custom or the written rules.

The admissibility of mining regulations is not affected by the shortness of the time that they have been in force. The common-law rule as to customs has no application to this point. A single extract from the written rules of a district may not be proved; the whole body of the rules must be offered in evidence.

When regulations have been proved, their construction, like that of other writings, is for the court. But where good faith is shown, a substantial compliance with them is sufficient.

There is a distinction between the local rule made by a few miners within a district and a mining regulation enacted by the whole district, or a custom in universal force throughout the district. The former is not binding upon the locator, unless he had actual notice of its existence or assisted in its enactment.

The effect of a failure to comply with local regulations is discussed below in Chapter XI., Div. II.

United States. *Campbell v. Rankin*, 99, 261 (1878). "But the local record of a mining community, while it may be and probably is the best evidence of the rules and customs governing the community and to some extent the distribution of mining rights, is not the best evidence or the only evidence of priority or extent of actual possession. It may fix limits to individual acquisitions, the terms and rules for acquiring and transferring mining rights as the laws of the State do in regard to ordinary property; but such rules and customs no more determine who was the first locator or where he located, than any other competent evidence of that fact."

Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439 (1879), C. C. D. Nev. The mining laws of Columbus District, sec. 8, provided: "Each locator or claimant in any ledge shall be entitled to three hundred feet by location. . . . The locator or locators of any ledge or lode shall also be entitled to hold one hundred feet on each side of said ledge or lode, together with all minerals therein contained." Also, "each claim located shall have a mound or stake placed thereon, on which shall be marked the name of the company, and the number of feet located and claimed," and "all notices of location shall contain the names of locators or claims." A notice claiming fourteen

hundred feet upon a certain lode, "together with all the privileges granted by the laws of the C. Mining District, running seven hundred feet each side of this notice," is sufficient to entitle the locators to hold one hundred feet each side of the lode.

North Noonday Min. Co. v. Orient Min. Co., 6 Sawy. 299; 1 Fed. 522 (1880), C. C. D. Cal. A regulation prescribing a width of claim less than that fixed by Rev. Stats. 2320, to be valid must be in force at the time of the location. The statute of California provides that "proof must be admitted of the customs, usages, or regulations established and in force," and that they must govern the decision of the action. A regulation does not, like a statute, acquire validity by its mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse or is generally avoided. Whether it has so fallen into disuse is a question of fact to be determined by the jury on the evidence. Violation by a few persons is not sufficient to abrogate a rule still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. In this case defendant showed a regulation fixing the width at fifty feet on each side, adopted in 1860, and continued by amendments to 1867. There was no action in regard to the rules of the district from that time to 1876 (after the locations in question), when the miners declined to adopt the "United States Law." The plaintiff showed that there were no locations in the district in 1872; one in 1873, with no width specified; none in 1874; eleven in 1875, of which nine were three hundred feet, and two fifty feet on each side; in 1876, twenty-five, of which six were three hundred feet, and the rest fifty feet on each side. It was argued from this that there had been an abandonment of mining in the district for several years, and that there were no rules, and the jury found for the plaintiff.

Jupiter M. Co. v. Bodie Consol. M. Co., 11 Fed. 666; 7 Sawy. 96 (1880), C. C. D. Cal. Same point as in *North Noonday M. Co. v. Orient M. Co.* Jury charged in almost identical language.

Woodruff v. North Bloomfield G. M. Co., 18 Fed. 753 (1884), C. C. D. Cal. The right to deposit refuse upon the lands along the banks of a river cannot be set up as a "custom of miners." "None of these (statutory) provisions, either State or National, have any relation at all to the subject matter of this suit. They simply recognize and legalize customs and regulations by which miners' rights, as between themselves, upon the public lands may be secured, regulated, and protected. They relate to 'mining claims' alone,—to the manner of acquiring and protecting rights in them. They refer to the extent of the claim, the manner of taking up and holding it, the evidence of title, etc., as between themselves and as against each other, and in the State legislation, not as against the government or owner of the land. Much less does it attempt to give them rights as against private parties, vested with the fee of other lands not mining, and not even within the mining regions. It has no relation to lands owned in fee by private parties. The principle acted upon was to regard the miners, as against everybody except the owner of the lands in which the mines were found, as the proprietors of limited portions of the mines on the public lands actually in their possession and occu-

pation, and to prescribe rules for the acquisition, regulation, and protection of such limited rights."

Erhardt v. Boaro, 113, 527 (1884). Field, J.: "Before 1866, mining claims upon the public lands were held under regulations adopted by the miners themselves in different localities. These regulations were framed with such just regard for the rights of all seekers of the precious metals, and afforded such complete protection, that they soon received the sanction of the local legislatures and tribunals; and, when not in conflict with the laws of the United States, or of the State or Territory in which the mining ground was situated, were appealed to for the protection of miners in their respective claims, and the settlement of their controversies. And although, since 1866, Congress has to some extent legislated on the subject, prescribing the limits of location and appropriation and the extent of mining ground which one may thus acquire, miners are still permitted, in their respective districts, to make rules and regulations not in conflict with the laws of the United States or of the State or Territory in which the districts are situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. Rev. Stats. 2324. In all legislation, whether of Congress or of the State or Territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development, by working, as the condition of continued ownership until a patent is obtained." "It does not appear, in this case, that there were any mining regulations in the vicinity of the Hawk Lode, which affect in any respect the questions involved here. Had such regulations existed they should have been proved as facts in the case. We are therefore left entirely to the laws of the United States and the laws of Colorado on the subject."

Glacier M. Co. v. Willis, 127, 471 (1887). Locations made prior to the passage of the act of 1866 are governed by the local rules and customs in force at the time of the location. Whether a location was so made cannot be determined on demurrer.

Parley's Park S. M. Co. v. Kerr, 130, 256 (1889). The question under Rev. Stats. 2319, as to what customs and rules of miners in a mining district, not inconsistent with the laws of the United States, are in force in the district when an application is made for a patent of mineral land, is one of fact determinable by the Commissioner of the Land Office. A rule of a mining district, adopted May 17, 1870, limiting the width of a mining location to two hundred feet, was so modified on May 4, 1872, that thereafter the surface width was to be governed by the laws of the United States. Consequently the provisions of the act of May 10, 1872, as to width of claims were in force in the district.

McKinley v. Wheeler, 130, 630 (1889). A corporation interested in mining may be represented by its officer or agent at any meeting of miners called together to frame rules and regulations in their mining district.

Rush v. French, 1, 99 (1874). Before May 10, 1872, possession and occupancy, so long as they continued, were sufficient to hold a mining claim against one attempting to make

Arizona.

a subsequent location. "If the miners had legislated upon the subject, and in their local assemblies, known as miners' meetings, had adopted a law that mere possession should not hold against a party regularly locating under the laws, then such possession would not prevail as against such subsequent location; but in the absence of such law, and its absence is presumed until the contrary is shown, actual possession is good as long as it lasts."

"Up to May, 1872, there was generally no limit to the power of the local legislatures known as miners' meetings, except the general principles of law. During this time, then, actual possession was good so far as it did not claim more than the law allowed, it not being shown that a failure to comply with the rules by posting a notice, recording, working, etc., was of itself declared to work a forfeiture."

Johnson v. McLaughlin, 1, 493 (1884). Defendant located his claim in accordance with the provisions, and complied with all the requirements, of the statutes of the United States and the Territory, but did not comply with a district regulation by which a locator was required to record his claim with the district recorder and procure him to go upon the ground to inspect the same for the purpose of finding prior claims. Subsequently plaintiff located the same ground, complying with the district regulation as well as with all other requisites. *Held*, as there was no provision in the district regulations for forfeiture for failure to comply with this rule, the defendant's title was not defeated but was valid. "The laws of the United States are of course paramount. . . . The laws of either State or Territory must not conflict with those of the United States, and so far as they do they are entirely nugatory to the extent of said conflict."

Fairbanks v. Woodhouse, 6, 433 (1856). "Mining laws, when introduced in evidence, are to be construed by the court, and the question whether by virtue of such laws a forfeiture had accrued is a question of law. It was therefore improper to submit it to the determination of the jury."

Waring v. Crow, 11, 366 (1858). The rights of the owner of a mining claim being fixed by the rules of property, which are the general law of the land, cannot be divested by neighborhood custom or regulation. The court below was affirmed, having charged: "Where a party has once acquired a right by possession to a mining claim, no mining law can divest him of that right unless he assisted in the passage of such law, in which case he would be considered a party to the contract. Mining laws may be given in evidence to prove a custom in respect to the size of claims, or to raise a presumption of abandonment where such laws have a universal notoriety throughout such district; or if they have not, then proof must be given that the party sought to be bound had actual notice of them."

McGarrity v. Byington, 12, 426 (1859). "The failure to comply with any one of the mining rules and regulations of the camp is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with such of them as make non-compliance a cause of forfeiture."

Roach v. Gray, 16, 383 (1860). In a suit for mining claims,

defendants may give in evidence the mining rules of the district, though adopted after the rights of the plaintiff attached. Admitting that the plaintiff's rights could not be affected by such rules, still, as defendants claimed under them, they were competent evidence to determine the nature and extent of defendants' claim, the effect of such rules upon pre-existing rights being sufficiently guarded by the instructions of the court.

Atwood v. Fricot, 17, 37 (1860). See this case under Chap. XIII., Div. I., *post*.

English v. Johnson, 17, 107 (1860). Miners have the right to prescribe rules governing the acquisition and divesting of title to claims and their extent, subject only to the general laws of the State. An extract or single clause of a book containing the mining rules of a district is inadmissible; the whole of the laws in the book should be offered.

Prosser v. Parks, 18, 47 (1861). The quantity of ground a miner may acquire by location or prior appropriation for mining purposes may be limited by the rules and regulations of the district, but not the quantity or the number of claims he may acquire by purchase.

Gore v. McBrayer, 18, 582 (1861). The fact that the notice of a meeting to pass mining rules named a day different from that on which they were passed does not affect their admissibility as evidence. It is enough that the miners agreed upon their local laws, and that these are recognized as the rules of the vicinage unless some fraud be shown or some other like cause for rejecting the laws.

Table Mountain Tunnel Co. v. Stranahan, 20, 198 (1862). Upon the question of reasonableness of the extent of a mining location, a general custom, whether existing before the location or not, may be given in evidence; but a local rule stands upon a different footing, and is inadmissible to affect the validity of a claim acquired previous to its establishment. "The former results from the general sense of the mining community as to what is just and reasonable in that respect, and in connection with the particular circumstances of the case, may be safely relied on in arriving at a conclusion. The latter owes its origin to the will and discretion of a few individuals, and operating directly upon the location sought to be limited, would be an improper and unjust criterion of action, as in many cases its effect would be to deprive persons of property to which, prior to its adoption, they had a valid legal right."

Colman v. Clements, 23, 245 (1863). In ejectment for mining claims, mining rules and customs in support of an alleged title may be given in evidence without having been averred in the complaint.

Morton v. Solambo Copper Min. Co., 26, 527 (1864). Mining regulations, having received the sanction of the legislature in the act of 1852, have become as much a part of the law of the land as the common law itself, which was not adopted in a more solemn form.

If a mining custom allows a person to locate a vein or lode for himself and others by placing thereon a notice with his own name and the names of those whom he may choose to associate with him appended thereto, designating the extent of the claim; and one person thus locates a lode for himself and others, some of whom have no knowledge of the location, these latter become tenants in common

with the locator and the others, and cannot be divested of their interest by the locator's afterwards tearing down the notice and posting another, omitting their names, unless this is done with their knowledge and assent.

Table Mountain Tunnel Co. v. Stranahan, 81, 387 (1866). Where there are no local customs or regulations in force in the district where a mining claim is located at the time of its location, general customs then in force are admissible upon the question of the reasonableness of its extent, but not evidence of local usages and customs in different localities varying from each other as to the size of claims located.

If the defendants in an action claim that when they took up the ground in dispute, a local custom allowed them three hundred feet front to each man, and that they located to that extent, they are estopped from asserting that the plaintiff's location to the same amount, before the adoption of the custom, was unreasonable in size.

Section 621 of the Practice Act provides that local customs, etc., not general customs, shall govern the decision of actions. If a company locates a mining claim of a certain width extending through the mountain from base to base, and afterwards another company succeeds to their possession, whatever it was, and puts up a notice stating that its claim comprises the channel then existing with its dips and angles through the mountain, the latter company is not restricted by this notice to one paying channel within the claim.

An alteration made after their adoption in one of several mining regulations, reduced to writing by the officers of the meeting, does not change the legal effect of the other articles.

Pralus v. Jefferson G. & S. M. Co., 34, 558 (1868). In an action to quiet title to a mining claim, the findings were entirely silent as to the method which the mining laws or customs prescribed for locating, working, or defining the boundaries of claims or their extent. "In the absence of light on these subjects it is impossible to say whether or not the plaintiffs located their claim in accordance with those laws or customs, and as the plaintiffs hold the affirmative of the issue it is incumbent on them to prove not only what acts were required to be done under the mining laws or customs to locate and hold a claim, but also to show a compliance on their part with these requirements."

Harvey v. Ryan, 42, 626 (1872). In an action for possession of a mining claim, where plaintiff relied upon a location under certain written rules adopted by the miners of the district, which contained no requirements that notices should be posted on the claims at the time of the location, defendant may prove a custom in the district requiring such posting of notices. No distinction is made by the statute (Practice Act, sec. 3, 621) between the effect of a "custom" or "usage," the proof of which must rest in parol, or a "regulation," which may be adopted at a miners' meeting and embodied in a written local law.

The custom or regulation must not only be established, but must be in force. A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. Whether the law is in force at any given time is for the jury.

The custom sought to be proven in this case was not even in conflict with the mining rules. It merely prescribed another and not unreasonable act in the series of acts required for a location.

Original Co. v. Winthrop Mining Co., 60, 631 (1882). It was error to charge the jury that a locator of a mining claim must not only observe the act of Congress which required that ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein, until a patent shall have been issued therefor, "but also the local regulations of the miners of this district which require that work shall be done every sixty days on the claim." There is a clear conflict between the law and the regulation, and the law must prevail.

Donahue v. Meister, 88, 121 (1891). A notice written on one side of a sheet of paper, which was folded with the writing inside and placed on a mound of rocks three feet high and under two flat rocks, so that about three-quarters of an inch of the margin was exposed to view, and which was so placed not for the purpose of concealing it, but in good faith to protect it from the weather, is sufficiently posted to comply substantially with a regulation requiring that "the notice should be posted conspicuously in a conspicuous place upon the claim located." A substantial compliance with mining customs, where good faith is shown, is sufficient.

Sullivan v. Hense, 2, 424 (1874). Before any law was enacted by the territorial assembly, regulating the manner of locating and conveying mining claims on the public domain, these were governed and regulated by laws made by the inhabitants of the district in which the claim was situated, or in the absence of such rules by the local customs and usages of the district. These were subsequently given legal effect by the legislature. Judicial notice cannot be taken of these rules, usages, and customs. They must be proved at the trial like any other fact.

Wolfley v. Lebanon M. Co. of N. Y., 4, 112 (1878). Local laws when not in conflict with the laws of the United States are of binding force and must be observed, but the act of Congress is not to be construed in subordination of these laws. A patentee cannot acquire by virtue of local law or custom a greater interest or estate than that which the paramount law warrants.

Sweet v. Webber, 7, 443 (1884). Neither a rule of miners nor a State law can authorize a less annual expenditure on claims than is required by the act of Congress, without being in conflict therewith and therefore void.

Becker v. Pugh, 9, 589 (1886). A requirement of miners' regulations that a claim be "staked off," means, it seems, that the boundaries, or at least the course of the veins, be marked with stakes. It is not complied with by erecting one stake containing a notice.

Flaherty v. Gwinn, 1, 509 (1878). Defendant offered evidence the record books of the district as tending to show that there was during a certain time a custom among miners in the district requiring locations to be recorded. Counsel stating that this was to be followed by other evidence tending to prove the same thing, it was held to be admissible.

"Now there are more ways of proving a rule or regulation of miners than by the act of the miners in their meetings or by a written record. Such rule or regulation may be established and shown to be in force by custom or usage." "In order to deprive a party of the right to property which he is enabled to acquire by a compliance with the provisions of the statutes of the United States, by the imposition of any additional burdens or obligations imposed by rules and regulations of miners, such rules and regulations must be clear and positive in their character and requirements, and must not rest in inference or presumption; they must enforce an obligation to do some certain and specific act, which, if not complied with, will, by the terms of the rule, deprive the locator of some right.

"Where miners, in their experience, deem some additional rule or regulation requisite, providing for some additional act thought necessary for the better protection of the miner and his rights in mining property, there is no doubt in my mind but that it is entirely competent for them to establish such rules and regulations, provided they are reasonable and do not conflict with federal or territorial legislation, and attach penalties for their violation. Now, if it was the custom of miners to record all claims located in the office of the mining recorder of the district, that fact is proper to be given in evidence as one act only, tending to prove a local rule or regulation making the recording obligatory."

Ralston v. Plowman, 1, 595 (1875). It is error to admit Idaho. parol evidence of local mining customs when it appears that they were recorded in the proper office according to the laws relating thereto. Whether mining regulations are contrary to law is for the court, not the jury.

Rosenthal v. Ives, 2, 244 (1887). Rules and customs of miners reasonable in themselves and not in conflict with any higher law may still be adopted and enforced as a part of the law. A custom limiting placer claims to eighty rods in length is reasonable and in entire harmony with the spirit of the law.

King v. Edwards, 1, 235 (1870). "The mining customs of any particular mining district have the force and effect of laws, or in other words, are laws." "The title to mineral lands is vested in the United States. Any citizen of the United States, or any person who has declared his intention to become such, may, by complying with the local rules and customs of any district, become vested with the right to possess and mine any specific portion of mining ground. The customs which point out the manner of locating mining ground are conditions precedent. A substantial compliance with them is necessary. The right to possess and mine any mining ground is derived from the United States by virtue of this compliance. The United States is divested of this right as effectually as if these rules and customs were acts of Congress, for they are now the American common law of mining for precious metals. The regulations of miners which require that so much work must be performed upon each claim are conditions subsequent." Their breach works a forfeiture, although the rule itself does not so provide. What customs are in force in a district is a question for the jury, and it would be

error to charge that because there is a dispute as to what is the custom, a forfeiture cannot be found.

The written laws of a district are presumed to be in force, and a custom contrary to them must be clearly proved. It is not competent to ask a witness if he knows of a custom of a district to prevent a thing the opposite of which was prescribed by the written rule. The rules and customs of one district cannot be introduced to vary those of another district.

Mining rules and customs must be reasonable. A custom requiring work to be performed directly in reference to ground in the district is not unreasonable. Where mining ground could not be worked profitably without going outside the district to run a bed rock, flume, or drain race to it, a custom requiring work to be done in the district to represent it might be unreasonable.

Boucher v. Mulverhill, 1, 306 (1871). Mining regulations provided "that no claim shall be recognized as legally held unless the prior claimant has personally pre-empted the same, with the exception of three claims allowed the discoverers for their prospecting partners." *Prospecting partners* is not to be construed by the law of strict partnership. It includes those who furnish money and provisions, for which they are to receive interests in the mining grounds that might be discovered. This rule is not against public policy, and should be upheld.

Robertson v. Smith, 1, 410 (1871). "The clause 'subject to such regulations as may be prescribed by law' reserves only the right to regulate the manner and conditions under which miners must work their claims, by legal enactments. The clause 'subject to the local customs or rules of miners in the several mining districts' refers evidently to the rules, customs, and regulations of miners in relation to the location, user, and forfeiture of mining claims. By no rule of legal construction that I am aware of can these clauses be made to refer to a reservation of a right to the public to construct a highway over located mining claims."

Orr v. Haskell, 2, 225 (1874). A book containing the rules and regulations of the miners of the district in which the mining land in controversy was situated is competent evidence under sec. 504, Civ. Prac. Act, and under sec. 207, same act, the jury may take said book to their room when they retire for deliberation.

Gropper v. King, 4, 367 (1882). When the rules and customs of a mining district are not in conflict with the laws of the United States or the Territory, they become a part of the law of the land, and when complied with in the taking up and locating mining ground, a grant from the government follows and title vests in the locator.

Mallett v. Uncle Sam G. & S. M. Co., 1, 188 (1865). **Nevada.** Usually the mining claims in this State have been located with direct reference to the mining laws established in the district where the location is made. Such mining laws when once established are recognized by the courts, and indeed the legislature of the State has given them the force and binding obligation of legislative enactment (Stats. of Nev., p. 21, sec. 77). When those mining laws directly point out how mining claims must be located, and how the

possession once acquired is to be maintained and continued, that course must be strictly pursued. A failure to do so works a forfeiture, —not a strict forfeiture, “but a kind of forfeiture recognized by the courts of this coast from the earliest day, and which is certainly founded upon rational and just principles.” When, a court presumes title in a first appropriator, it can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired. In the absence of mining laws, the miner locating a claim holds only by actual occupancy and by such working for the development of the mine as would under all the circumstances be deemed reasonable, and his right of possession will only be continued by occupancy and use.

Oreumuna v. Uncle Sam G. & S. M. Co., 1, 215 (1865). *Mallett v. Uncle Sam G. & S. M. Co.* followed. It was not error to instruct the jury as follows: “To enable a party to maintain a right to a mining claim, after the right is acquired, it is necessary that the party continue substantially to comply with mining rules and customs established and in force in the district where the claim is situated upon which such right is made to depend.”

Smith v. North American M. Co., 1, 423 (1865). Mining customs may be proved under the Nevada statute, however recent their date or short the duration of their establishment. The common law rules as to customs do not apply to them.

Leet v. John Dare S. M. Co., 6, 218 (1870). The mining regulations of the White Pine District provided that each claimant should be entitled to hold by location two hundred feet; that all locations should have two days' work done upon them annually for each location; that work done upon a portion of a location should be deemed done for the benefit of the whole of said location. *Held*, where a company located twelve hundred feet, “location” in the regulations meant the aggregate of the ground claimed by the parties, and not the interest of a single shareholder, and two days' work was sufficient to preserve the claim from relocation for a year.

Golden Fleece G. & S. M. Co. v. Cable Consolidated G. & S. M. Co., 12, 312 (1877). “All that the government requires to be done in order to obtain its license to occupy is prescribed by the law, and in the absence of local rules a compliance with the public law will secure the claim. The miners in their respective districts may, if they choose, exact something more; but they are not obliged to do so, and no court, in the absence of proof, will presume that they have done so.” “Proof of a record is totally irrelevant without proof of some regulation making a record obligatory or giving it some effect.” For neither of these does the law provide, leaving their enactment to the miners of the respective districts.

Gleeson v. Martin White M. Co., 13, 442 (1878). It seems that the act of 1872 was a revocation of local rules requiring notices and record, and if a locator chose to mark his boundaries at once, the validity of his claim was not affected by his failure to record. These provisions of the local rules, if remaining in force, only serve to protect the claim during the time reasonably necessary for tracing its course and marking its boundaries. But if such rules were re-enacted

after the passage of the act of 1872, then compliance with them became essential.

Poujade v. Ryan, 21, 449 (1893). The court will not take judicial notice of the existence of a rule requiring claims to be recorded. Such rule, if it exists, must be proved like any other fact in the case.

Marshall v. Harney Peak T. M. M. & M. Co., 1, South Dakota, 350 (1890). In the absence of proof of regulations, it will be presumed that none exist.

Utah. *Roberts v. Wilson*, 1, 292 (1876). "In order to introduce the written local mining laws of a district, it is necessary that it should appear *aliunde* that the copy comes from the proper repository, and that such party was empowered to give a certified copy so as to become evidence, and that such was a copy of the laws prevailing and in force in the district at the required date. These things have not been, and could not be, shown by the certificate attached to the alleged laws. Nor is there any authority for showing them by affidavit. This could only be done by express statute, and no such statute exists. In attempting to prove these facts the opposite party is entitled to his right of cross-examination; from which he is cut off if *ex parte* affidavits are sufficient."

McCormick v. Varnes, 2, 355 (1878). Congress has given to the local laws and customs of miners the force and effect of laws, so far as they are not in conflict with any superior law.

LAND OFFICE DECISIONS.

A location notice which, after naming the locators and their interests to the extent of 1,000 feet, concludes: "We claim 500 feet easterly and 500 feet westerly, situate about 200 feet easterly from the Sacramento," is sufficient under mining rules which require the notice to state "the number of feet claimed in the location and number claimed each side of monument," and that "in making a record of location of any claim the same shall be definitely described with reference to some natural or artificial monument."

Where the district rules provide that "the recorder in person or through his deputies go on the ground before filing a location for record and see that the proper notice and monument are placed thereon, and note on the notice and in a book for that purpose the locality of said location," the fact that notice was filed and recorded is corroborative evidence that the locator had complied with the law in the matter of location. *Red Pine Mine*, Copp, 158 (1875).

"The laws adopted by miners of a district must remain in force until amended, or repealed by the same authority that established them, or until abolished or modified by a law of the United States, or of the State or Territory within which the district is situated." An applicant for a patent, who had not complied with the local regulations, alleged that they were obsolete, and proved that a majority of locators in the district had disregarded them, though some had located in accordance with them. This was held not to establish the allegation, and the application was refused. *Chavanne Quartz Mine*, Copp, 283 (1880).

CHAPTER XI.

HOW TITLE TO MINING CLAIMS MAY BE TERMINATED.

I. By Abandonment.

II. By Forfeiture.

I. BY ABANDONMENT.

PROPERTY in a mining claim may be lost by abandonment. This is a voluntary act, and consists of relinquishing possession of the claim with an intention not to return and occupy it. The claim then becomes again a part of the unoccupied and unappropriated public domain, open to location by any one. Abandonment is purely a question of intention, to be determined by a jury.¹ If there is no *animus revertendi*, the desertion of the claim determines the property at once, without regard to the duration of the locator's absence. On the other hand, abandonment will not be presumed from mere lapse of time. The question is one of intention only, and lapse of time is only evidence of intention not to return.

Abandonment must leave the land free to the appropriation of the next comer, whoever he may be. It must be an absolute desertion of the premises regardless of what may become of them in the future. It would logically follow that if the locator left in order that another might continue his possession, or expressed, upon leaving, the wish that a certain person might succeed him, this would not be an abandonment, but a gift, and it has been so decided in California. A different view, however, was taken in *Murley v. Ennis*, 2 Colo. 300, where the leaving without an intention of returning was treated as an abandonment, though he yielded up the possession to another on leaving.² So the admission of another into a share of the claim is held in this view to be an abandonment *pro tanto* and an appropriation by the other

¹ In New Mexico there is a statutory provision by which a claim may be abandoned by recording a certificate of such a purpose. Act Feb. 5, 1889, sec. 6, p. 42

² And see *Black v. Elkhorn M. Co.*, 163 U. S. 445.

person. The former view, which treats this succession as a gift, is the better one, and seems to have subsequently had the indorsement of the Colorado courts in *Omar v. Soper*. It follows from this view that a relocation by the original locator is not an abandonment of the first location, although in the second location new parties are joined.

An abandonment can be taken advantage of only by one who has subsequently acquired rights in the property.

It need not be specially pleaded, but may be proved under the general issue.

Little Pittsburg Con. M. Co. v. Amie M. Co., 17 United States. Fed. 57 (1883), C. C. D. Colo. After a claim has been properly located, the owner of it may sell any part of it without prejudice to his right to hold the remainder. He may dispose of it, or any part of it, by grant or gift in any way that seems proper to him. The transfer of a part containing the discovery shaft is not an abandonment of the rest of the claim.

Doe v. Waterloo M. Co., 70 Fed. 455 (1895), C. C. Ap., 9th Circ. The discoverer of a vein posted a notice, and then verbally agreed to transfer to others one-half of the claim if they would complete the location. This was not an abandonment.

Black v. Elkhorn M. Co., 163, 445 (1896). See this case under Chap. XII., Div. I.

Davis v. Butler, 6, 510 (1856). An abandonment of a mining claim determines the right of the party thereto from the date of the act of abandonment. Having once abandoned his claim, he will not be permitted to come, within the time allowed for commencing civil actions by the Statutes of Limitations, to reassert or resume his claim to the prejudice of those who may have in the mean time appropriated it.

Partridge v. McKinney, 10, 181 (1858). The law will not presume an abandonment of property in a dam and ditch for mining purposes from lapse of time.

Waring v. Crow, 11, 366 (1858). The court charged: "Where an abandonment is sought to be established by the act of the party, the intention alone governs, and if such party leave a mining claim with the intention not to return, his abandonment is as complete if it last for a minute or a second as though it continued for years; but if he left it with the intention of returning, he might do so at any time within five years, provided there was no rule, usage, or custom of miners of such a notorious character as to raise a presumption of an intention to abandon."¹ This was held to fairly leave the question of the abandonment to the jury.

As the possession of one tenant in common is the possession of all, the mere fact that one such tenant or partner goes away and remains absent, leaving his associates in possession, creates no presumption of abandonment.

¹ Subject now to law as to annual work.

McGarrity v. Byington, 12, 426 (1859). "Especially in the absence of any custom or local regulation, a right of property, once attached in a mining claim, does not depend upon mere diligence in working it. Not to work it may be a circumstance of some weight tending to show abandonment, and this abandonment of a claim resting for validity only on possession, may be sufficient to defeat the title."

Richardson v. McNulty, 24, 339 (1864). In an action to recover possession of a mining claim where the defence is abandonment by the plaintiff, the judgment roll in an action by the plaintiff against third parties to recover possession of the same ground, and in which plaintiff had judgment, is admissible to rebut evidence of an intention to abandon. An abandonment can only take place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess it for himself, and regardless of what may become of it in the future. If the possession of the occupant be continued in another by the expression of a wish of the occupant to that other that he succeed to the possession, and he thereupon takes possession, a gift is the result; there is no abandonment.

Pralus v. Pacific G. & S. M. Co., 35, 30 (1868). Where the defendant in an action to quiet title to a mining claim on the public lands set up in a supplemental answer both abandonment and forfeiture by the plaintiffs of their asserted title to and possession of said claim after suit commenced, but failed to set up any subsequently acquired rights therein by the defendant, these matters were unavailing as a defence.

Bell v. Bed Rock T. & M. Co., 36, 214 (1868). In an action to recover a mining claim, defendant may prove abandonment by plaintiff without having specially pleaded it.

When defendant in support of a plea of abandonment proves that plaintiff left the land and ceased to work or occupy it, plaintiff may in rebuttal show acts explanatory of the leaving which tend to show that it was not attended by an intention not to return. Evidence that, subsequent to the leaving, a party on behalf of the defendants offered to buy plaintiff's claim, and plaintiff refused to sell, is admissible for this purpose.

Marquart v. Bradford, 43, 526 (1872). An estoppel *in pais* does not constitute an element of abandonment, nor is it one of the circumstances from which an abandonment may be found.

Morenhaut v. Wilson, 52, 263 (1877). To be driven from a mining claim by Indian hostilities does not constitute an abandonment. An abandonment may be proved under the general issue.

Stone v. Geyser Quicksilver M. Co., 52, 315 (1877). The question of abandonment can never arise except where there has been possession, and then the *animus revertendi* is the simple test. Whether the intention is entertained in good or bad faith does not affect the question. Whether a defendant in ejectment who pleads abandonment reasonably believed that the ground had been abandoned, does not affect the decision of the question of abandonment.

Seymour v. Wood, 53, 303 (1878). Where the plaintiff in ejectment for a mining claim on cross-examination admitted that he had not worked the claim for several years, having during that time fol-

lowed mining in Mexico, and his machinery had been removed from the claim, the testimony established an abandonment, and a verdict for the plaintiff was against the evidence.

Richards v. Dower, 81, 44 (1889). In the act of Congress of 1867, granting lands for town sites, there is a reservation of gold mines. Under this act "a mine is not reserved unless it is not only known, but known to be valuable at the date of the patent, or discovered to be so before the occupation or improvement of the lots containing them, for residences or business under the town site title." "One essential requisite of a gold mine is a natural deposit of rock or earth containing a sufficient quantity of gold to admit of profitable working." The burden of proof is on the one setting up a title to a mine under the reservation. If the latter had been worked prior to the town site patent, but had been abandoned, it cannot be presumed to have contained a valuable deposit at the date of the patent. When the evidence is sufficient to show an intention to abandon the mine, as having become valueless, the *possessio pedis* by the miners of shafts, tunnels, inclines, dumps, and slopes on the vein, if continuing until the date of the town site patent, would amount to a mining claim, or would have the effect of preventing the land on which they were situated from passing by the patent.

Trevaskis v. Peard, 44 Pac. 246 (1896). Where the owner of a claim which was erroneously included in a judicial sale removed his effects therefrom and absented himself for two years, intending to claim it only in case the development by the purchasers rendered it profitable, his acts will constitute abandonment.

Proof of abandonment may be given by the plaintiff without a special plea when the defendant pleads and relies on a location prior to the plaintiff's.

Murley v. Ennis, 2, 300 (1874). Title by location "may be lost by abandonment, as all must agree; for the right, while absolute in the present, exists as to the future only upon condition that the occupant shall perfect the improvement which the law requires, proceeding with reasonable diligence therein; so that if he desert the premises though but for a moment, with the intent not to resume his labors, his right is gone. So if without writing he yield up the possession to another, the right which before was in him passes to his successor in possession, or rather the right of the first occupant is gone by abandonment; and by virtue of his occupancy a new right has arisen in him who succeeds. And so if the first occupant, while his right is still incipient, admit another in possession with him, upon the agreement that the labor of development shall be performed by the two for their common benefit, this amounts to an abandonment *pro tanto*, and if the development be afterwards perfected by their joint labors, the better right which is thereby acquired inures to the two jointly. The case is not different where the first occupant, pending the labor of development, agrees for a consideration to proceed therein for himself and another jointly; for such undertaking amounts to an abandonment as to such interest in the premises as he agrees shall inure to that other, and creates an agency also, whereby every blow thereafter stricken is the act both of him and his associate."

"If, by the understanding of the parties, E. and T. were to provide all supplies necessary to the prosecution of the work of development upon the lode, as the same might from time to time be required, then performance upon their part was a condition precedent to the obligation of M. to perform; and their failure would, it would seem, authorize him to treat the whole adventure as abandoned. He might then lawfully desert the work and proceed about his other affairs, or inasmuch as the default of E. and T. could not have the effect to compel him to abandon his right in the premises, he might with equal propriety proceed with and perfect the development of the lode upon his own account."

Derry v. Ross, 5, 295 (1880). Appropriation and occupancy of mining ground give a good and sufficient title as against all claimants except the government, so long as the appropriator remains in possession and complies with federal and local laws and regulations. This title may be divested by sale, gift, or abandonment. "Abandonment is a matter of intention, and operates *instantly*. Where a miner gives up his claim, and goes away without any intention of repossessing it, and regardless of what may become of it or who may appropriate it, an abandonment takes place, and the property reverts to its original status as part of the unoccupied public domain. It is then *publici juris*, and open to location by the first comer. No subsequent sale by the former locator in such case, after other rights have intervened, will convey any right or title to the grantee."

Omar v. Soper, 11, 380 (1888). A. and B., being joint owners of two claims, effected an exchange of interest by erasing A.'s name from one discovery notice and B.'s from the other. "It is a settled principle of law that an abandonment of property is a question of intention. A transaction affecting property may be irregular; but if the owner does not intend to abandon it, and continues in possession, claiming in good faith to be the owner, no abandonment can take place."

Miller v. Girard, 3 Ap. 278 (1893). If a locator permits an adjoining claimant to obtain a patent for that portion of his territory which includes his discovery shaft, and he is without another on the remaining portion, he is without title, and the latter reverts to the condition of public land open to location and purchase by others.

Nevada. Mallett v. Uncle Sam G. & S. M. Co., 1, 188 (1865). One way of losing title to a mining claim is by abandonment, to complete which a relinquishment of possession must unite with an intention not to return. Mere lapse of time will not alone work abandonment, but, taken with other circumstances, is evidence of an intention not to return.

Oreamuno v. Uncle Sam G. & S. Mining Co., 1, 215 (1865). "An abandonment is a mixed question of law and fact. If in fact the plaintiff intended to give up his claim, and quit paying assessments in pursuance of that intention, it was in fact an abandonment."

Weill v. Lucerne M. Co., 11, 200 (1876). Where one or more of the parties first locating mining ground, afterwards make a second location upon the same lode, with the names of other parties added to the notice, it appearing that at the time of the second location the

ground was undeveloped, and it was not known that both notices were upon the same lode, and also that the second notice was posted for the express purpose of protecting the original location; the second location of itself did not constitute an abandonment of the first. Abandonment is a question of intention and is for the jury.

Gleeson v. Martin White M. Co., 13, 442 (1878). The act of a locator in changing in the location certificate "westerly" and "easterly," describing the course of the vein to "northerly" and "southerly," is not evidence of an intention to abandon the claim; it proves exactly the reverse, and only that he had abandoned the opinion that the course of the vein was east and west.

Utah M. & M. Co. v. Dickert & Myers S. Co., 6, 183 (1889). **Utah.** The plaintiff's agent located a claim for the plaintiff, and after holding it and doing the work thereon for five years, he resigned his agency in 1882 and took adverse possession of the premises, which he subsequently conveyed to the defendant. It was error to find that the plaintiff abandoned the claim in 1882.

II. BY FORFEITURE.

Forfeiture of a mining claim is the loss of a locator's possessory title thereto by a failure to perform those acts by which mining claims are held, or to comply with the requirements of mining regulations. This method of determination of title has also been confused with abandonment, and in many cases the latter term has been applied to what is clearly a forfeiture. The confusion has arisen from regarding the failure of the locator to do those things necessary for the perpetuation of his title as equivalent to an abandonment of the ground. The distinction, however, is quite clear, as in the case of a forfeiture there is no question of intent, which is the controlling element in abandonment. The question involved is one of failure to perform certain acts, which is a question of fact.

Forfeiture by reason of failure to perform those acts which are requisite to the holding of a claim is provided for and governed by the provisions of Rev. Stats. 2324.¹

Failure to comply with the rules and regulations of the district also works a forfeiture. In California and Arizona, however, it is held that this takes place only where there is a provision in the rules themselves for forfeiture for non-compliance. In Montana and Nevada this is held to be unnecessary, the forfeiture

¹ See also California, Act March 27, 1897, p. 216; Colorado, M. A. S. sec. 3137; Minn., Gen. Stat. 1894, sec. 4069; Oregon, Hill's Ann. Laws 1892, sec. 3828; Wash., Gen. Stats 1891, sec. 2213; Wyoming, Laws 1888, ch. 40, sec. 23.

resulting necessarily from the non-compliance. Upon forfeiture the ground becomes open to relocation.

There is no necessity of a judicial declaration of forfeiture. The loss of title becomes absolute, and may be asserted by any one acquiring rights subsequently, provided the loss has not been repaired by the original locator himself. It can only be set up by one who has acquired such subsequent rights, or, as it has been said, in order that it may take place there must be some one who is entitled to receive the benefit of it.

The title to the claim is not divested by the failure to perform the acts requisite to hold it. That failure only throws the ground open to relocation. The divestiture of the original title takes place upon the acquirement of rights by a relocater. This relocater may be any one qualified to make a location, — even the original locator or one of several original locators.

Forfeiture must be pleaded specially by one relying on it in a contest for possessory rights, and the burden of proof is on the one who sets it up. As a defence it does not involve the question of possession, being analogous to a plea of confession and avoidance, which admits the plaintiff's possession but sets up the determination of his rights by defendant's entry and location.

Where one tenant in common relies upon his co-tenants to perform the acts necessary for the preservation of the claim, he can obtain no relief if the claim is forfeited by the failure of the co-tenant to do so.

In the last clause of Rev. Stats. 2324 there is a provision for the forfeiture of the interest of tenants in common who fail to contribute their share of annual expenditure or labor. The forfeiture in such case is to the co-tenants who have made the expenditure and complied with the procedure provided by the act.¹

United States. Mt. Diablo M. & M. Co. v. Callison, 5 Sawy. 439 (1879), C. C. D. Nev. Hillyer, J.: "Whenever we consider that the plaintiff had been in unquestioned occupation of all these claims for over ten years prior to the entry of defendants, and the amount of labor altogether done on the ground, we have no inclination, and do not deem it our duty, to strain for a construction of the law or of the facts upon which to declare a forfeiture. Forfeitures have always been deemed in law odious, and courts have universally insisted upon the forfeiture being made clearly apparent before enforcing it. Equity often interferes to relieve against forfeitures, but never to divest estates by enforcing them."

¹ See p. 282.

Jupiter M. Co. v. Bodie Con. M. Co., 11 Fed. 666; s. c. 7 Sawy. 96 (1881), C. C. D. Cal. Assuming the proposition that the miners have authority to make a regulation or law by which a mining claim may be forfeited by failure to record the location thereof, yet such regulation or law, in order to effect a forfeiture, must provide that such failure to record shall work a forfeiture of the claim.

Lakin v. Sierra Buttes Gold Mining Co., 25 Fed. 337 (1885), C. C. D. Cal. One who has forfeited his claim, by a failure to work his claim as required by the statute, may re-enter and resume work at any time before other rights attach in favor of subsequent locators.

Hammer v. Garfield M. & M. Co., 130, 291 (1889), affirming s. c. 6 Mont. 53. Upon the party setting up a forfeiture for non-compliance with mining regulations rests the burden of proof. He must furnish clear and convincing proof thereof.

Oscamp v. Crystal River M. Co., 58 Fed. 293 (1893), C. C. Ap., 8th Circ. "The failure of the owner to occupy or to work his claim during a given year will not operate to divest him of his title and to confer it upon another. A failure to work a claim to the extent required by the statute simply entitles a third party to relocate it in the mode pointed out by existing laws." The position of an overlapping junior locator is no better than that of any other third party.

Rush v. French, 1, 99 (1874). The failure to comply with a mining rule or regulation cannot work a forfeiture, unless the rule itself so provides.

Johnson v. McLaughlin, 1, 493 (1884). Defendant located his claim in accordance with the provisions, and complied with all the requisites, of the statutes of the United States and the Territory, but did not comply with a district regulation by which a locator was required to record his claim with the district recorder and procure him to go upon the ground to inspect the same for the purpose of finding prior claims. Subsequently plaintiff located the same ground, complying with the district regulation as well as with all other requisites.

Held, as there was no provision in the district regulations for forfeiture for failure to comply with this rule, the defendant's title was not defeated, but was valid.

McGarrity v. Byington, 12, 426 (1859). "The right to a mining claim vests by the taking in accordance with local rules. The failure to comply with any one of the mining rules and regulations of a camp is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with such of them as make non-compliance a cause of the forfeiture."

Colman v. Clements, 23, 245 (1863). Where a forfeiture is claimed under a mining regulation, the courts will construe most strictly against the claim of forfeiture. A rule required that one day's work should be done on each claim in every thirty days, etc. "Claim" was held to be used in a general sense, including all kinds of claims, joint as well as individual.

Wiseman v. McNulty, 25, 230 (1864). In order to have a forfeiture take place, there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues. Tenants in common of mining land, acting under a company name, are

incapable of taking or holding in the name of the company the interest of any of the tenants in common by forfeiture. The term "forfeiture" in its common law significance has no application to the rights, interests, or remedies of the several persons composing a mining association. A provision in an agreement between the members of such an association, that on failure to pay certain assessments a member shall forfeit his claim or share to the company, attempts to create not a forfeiture, but a mode of transferring title, which will not be recognized. The term "forfeiture" is often used by miners, and in many decided cases as synonymous with "abandonment."

St. John v. Kidd, 26, 263 (1864). The term "forfeiture," as used in our mining customs and codes, means the loss of a right to mine a particular piece of ground, previously acquired, by neglect or failure to comply with the rules and regulations of the bar or digging in which the ground is situated, prescribing the acts which must be done in order to continue and keep alive that right after it has been once acquired. As a defence it is entirely distinct and separate from that of abandonment; it involves no question of intent, but rests entirely upon the mining rules and regulations, and involves only the question whether in point of fact those rules and regulations have been observed by the party seeking to maintain or perpetuate the right regardless of what his intentions may have been.

Depuy v. Williams, 26, 310 (1864). The failure to perform the amount of work on a mining claim required by the local mining laws or regulations established and in force in the district where the claim is located, amounts to an abandonment of the claim, and thereupon it may be occupied and appropriated by another.

Pralus v. Pacific G. & S. M. Co., 35, 30 (1868). See this case on p. 297.

Bell v. Bed Rock T. & M. Co., 36, 214 (1868). The failure of a party to comply with a mining rule or regulation cannot work a forfeiture of title to his claim unless the rule so provides.

Strang v. Ryan, 46, 33 (1873). If the local mining laws provide that on a failure to work and post a claim as required, it shall be considered abandoned, a failure to comply with such laws is an abandonment, and the claim is open to relocation as vacant ground. If several, as tenants in common, locate a mining claim on the public land, and by failure to comply with the local rules forfeit the same, it may be relocated by a part of the first locators along with others who were strangers to the first location, and the tenants in common whose names are left out cease to have any interest.

Morenhaut v. Wilson, 52, 263 (1877). Mere failure to do the work, while it may cause a forfeiture, does not constitute an abandonment. A forfeiture under the provision of mining regulations must be pleaded specially.

A defence based merely upon forfeitures does not involve a denial of the plaintiff's possession or right of possession at the date of defendant's entry. It is analogous to a plea of confession and avoidance admitting possession, and a right of possession in the plaintiff which would have continued in him but for the defendant's entry and location, which by virtue of the mining laws terminated that right.

Souter v. Maguire, 78, 543 (1889). Findings showing a continuous possession of a mining claim by the locator, and performance of the annual amount of work required by law, are sufficient to dispose of an issue as to abandonment.

Idaho. *Kramer v. Settle*, 1, 485 (1873). The failure to perform the work on a mining claim required by State law to be done within a certain time after discovery amounts to an abandonment, and it may thereafter be appropriated by another. The performance of the work before such subsequent location will not cure the failure. But a failure to record a notice of location within the required time may be cured by recording it before a subsequent location.

Montana. *King v. Edwards*, 1, 235 (1870). The regulations of miners which require the performance of a certain amount of work upon each claim are conditions subsequent. So long as the locator complies with them, the right to possess the mine remains with him. Upon failure to comply, he forfeits his right. It is not necessary that the law should provide that a failure to comply should work a forfeiture. "When mining ground is forfeited by any one, it again becomes unappropriated mineral land of the United States. Any one who relocates it, in accordance with the mining rules and customs of the district in which the same is situated, has the rights of the government, and may proceed to declare a forfeiture, or may set up the defence of forfeiture in an action against him."

Herbert v. King, 1, 475 (1872). No regulations or customs of the district having been proven, the plaintiff introduced evidence which tended to show that the ground was unrepresented for five or six weeks, and that it thereby became subject to relocation, and was relocated by third parties, who worked it, unmolested by him, with his knowledge and without assertion of title by him. These facts raise a presumption of the right of location and establish an abandonment.

Belk v. Meagher, 3, 65 (1878), affirmed in s. c. 104 U. S. 279. "The original location being valid, and the ground having been represented as the law required so that no forfeiture has occurred, a defective conveyance would not create a forfeiture and subject the ground to relocation."

Saunders v. Mackey, 5, 523 (1885). A tenant in common who enters into an agreement with his co-tenant, by which the latter is to do the required annual work, forfeits his interest in the claim if the work be not done. The claim becomes thereby open to relocation, and a valid location can be made by the tenant who made default. The remedy of the other tenant is by action for breach of covenant, or to establish and enforce a trust in the claim as relocated.

Brundy v. Mayfield, 15, 201 (1895). The forfeiture provisions of Rev. Stat. 2324 must be strictly construed. Before the interest of a part owner of a mining claim can be forfeited to his co-owners, it must be a fact that he has failed to contribute his proportion of the annual expenditure required by law. If he has not failed to do this, the publication of forfeiture notices will not affect his title.

Nevada. *Mallett v. Uncle Sam G. & S. M. Co.*, 1, 188 (1865). "Usually the mining claims in this State have been located with direct reference to the mining laws established in the district

where the location is made. Such mining laws when once established are recognized by the courts, and indeed the legislature of the State has given them the force and binding obligation of legislative enactment. (Stats. of Nev., p. 21, sec. 77). When those mining laws directly point out how mining claims must be located, and how the possession once acquired is to be maintained and continued, that course must be strictly pursued." A failure to do so works a forfeiture, not a strict forfeiture, "but a kind of forfeiture recognized by the courts of this coast from the earliest day, and which is certainly founded upon rational and just principles." When a court presumes title in a first appropriator, it can only be a title subject to the conditions imposed by the mining laws and customs under and by virtue of which it was acquired. In the absence of mining laws, the miner locating a claim holds only by actual occupancy, and by such working for the development of the mine as would under all the circumstances be deemed reasonable, and his right of possession will be continued by occupancy and use.

Oreamuno v. Uncle Sam G. & S. Mining Co., 1, 215 (1865). *Mallett v. Uncle Sam G. & S. M. Co.* followed. It was not error to instruct the jury as follows: "To enable a party to maintain a right to a mining claim, after the right is acquired, it is necessary that the party continue substantially to comply with mining rules and customs established and in force in the district where the claim is situated upon which such right is made to depend."

Steel v. Gold Lead G. & S. M. Co., 18, 80 (1888). In an action on an adverse claim, under the Nevada statute, the defendant may give evidence of forfeiture without having pleaded it specially.

CHAPTER XII.

RELOCATION.

WHEN a mining claim has been abandoned or forfeited, it becomes again a part of the unappropriated and unoccupied public domain, and may be relocated by any one qualified originally to make a location. The acts requisite to the making of a relocation, are identical with those requisite to make an original location, except that the relocater may adopt the discovery and the monuments of the abandoned or forfeited location.¹ He has the same time to perform these acts as had the original locator. The act of relocation is an admission of the validity of the original location, and amounts to an assertion of its abandonment or forfeiture. It therefore does not properly include the location of the ground which another has previously attempted to locate, but to which he has failed to obtain a valid title by reason of failure to perform some of the necessary acts or by reason of his incompetency to make a location. Such a subsequent location is really an original location, the attempted location being invalid, and therefore no location. As only the unappropriated and unoccupied mineral land of the public domain is open to location, so there can be no relocation of mineral land until it has reverted to that condition. A location upon land already validly located creates no rights, and is not made valid by a subsequent abandonment or forfeiture of the original location. The abandonment must actually have taken place or the forfeiture be complete before the ground can be relocated. "The right to the possession comes only from a valid location. Consequently if there is no location, there can be no possession under it. Location does not

¹ The method of relocation is prescribed by statute in Arizona, Act March 20, 1895, sec. 11, p. 55; Colorado, M. A. S. 3162; Idaho, Act March 5, 1895, sec. 7, p. 26; Montana, Pol. Code 1895, sec. 3615; New Mexico, Act Feb. 5, 1889, sec. 3, p. 42; North Dakota, Rev. Codes 1895, sec. 1439; and Wyoming, Laws 1888, ch. 40, secs. 21 and 23; Dakota, Comp. Laws 1887, ch. 19, art. 1, sec. 2010.

necessarily follow from possession, but possession from location." Nor can a relocation be made of mining ground in the possession of others who have initiated a location and are diligently proceeding therewith. They are entitled to a reasonable time to perform the necessary acts, and an attempted relocation during that time is merely a trespass.

Where a locator has failed to perform the annual work required by the statute, a relocation may be prevented by a resumption of work by the original locator, his heirs, assigns, or legal representatives, "after failure and before such location." Rev. Stats. 2324. This resumption of work will defeat the relocation, if made at any time before the completion of the relocation. The mere possession, however, by the original locator, without an actual resumption of work, will not prevent a relocation.

A party may relocate his own claim. This is done where for any reason the original location is invalid.¹ It would seem that as in such case the original location was no location, the second would not be a relocation within the definition given above. But it is so treated, doubtless upon the theory that the original location is abandoned, its invalidity being assented to by the locator. Thereupon a new location is made which in its method is essentially a relocation, for by it all of the acts properly performed in the first location are adopted. Such a relocation will not relate to the date of the original location so as to cut out intervening rights. It is therefore to be distinguished from the filing of an amended certificate, which is intended to cure a defect in an existing location, and does so relate.²

Where a claim is forfeited by tenants in common, it may be relocated by one of them either by himself or with others, provided there is nothing in the circumstances of the forfeiture to estop him.³

When a claim has been relocated, the expenditure of \$500 required before patent will issue must be made upon the relocated claim. Work done previously to the relocation cannot therefore be included, though the original locator made or shared in the relocation.

¹ Colorado, M. A. S. 3160; Wyoming, Laws 1888, ch. 40, sec. 7; Dakota, Comp. Laws 1887, ch. 19, art. 1, sec. 2008; New Mexico, Act Feb. 5, 1889, sec. 4, p. 42.

² See Chap. VII., Div. III., C. (d).

³ See Chap. VI., Div. II., C.

the parties thereto is dissolved by mutual consent, none of the parties is under obligation to the others to perfect locations commenced in pursuance of the agreement, and subsequent locations covering the same ground made by some of them are not held in trust for the others.

Souter v. Maguire, 78, 543 (1889). A location upon a claim upon which there already exists a *valid* location is invalid.

Hall v. Arnott, 80, 348 (1889). A valid location or relocation can be made only when the ground is open to exploration and appropriation. A relocation for the purpose of correcting an error in the original location can only be made when the rights of others have not intervened.

Murphy v. Cobb, 5, 281 (1880). Where the plaintiff in **Colorado**. an action to recover mining ground, by his own testimony shows that the ground belonged to the defendant, and fails to show that it was open to relocation, evidence of such relocation by plaintiff and his grantors is inadmissible.

Pollard v. Shively, 5, 309 (1880). A claimant who has not kept up his boundary posts will not be permitted to show the courses and distances of his recorded location to be erroneous, when the rights of an intervening locator, without notice, will be prejudiced.

Lebanon M. Co. of N.Y. v. Consolidated Republican Mining Co., 6, 371 (1882). A subsequent location extending over a senior discovery in the actual possession of another is invalid as to the portion thereof occupied by that other. Entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession amount to a trespass, and cannot form the basis of acquiring title. Proof of actual possession of a mining claim under color of title at the time of defendant's entry is enough upon which to recover in ejectment.

Armstrong v. Lower, 6, 393 (1882). The relocation of an abandoned mining claim is made in substantially the same manner as the original location. The relocater must perform all the acts required in making a valid original location in the same manner and within the same time as if the premises had always remained a part of the unappropriated public domain, except that under statute he may adopt the boundary stakes of the abandoned claim, and instead of sinking a new shaft may sink the old shaft ten feet deeper. He also need not make a technical discovery if he finds a vein in the discovery shaft of the abandoned claim. Only the unoccupied and unappropriated mineral lands of the general government are open to exploration and location. When a locator has fully complied with the law in locating his claim he is entitled to exclusive possession and enjoyment thereof until it is forfeited or abandoned. The locator must sink his discovery shaft upon territory which he has a right to appropriate. If he sinks it upon ground embraced in a prior valid and subsisting location, though with the consent of the owners thereof, he is in no better position than if he had not sunk a shaft.

One who has made a proper and valid location of a lode claim is entitled to the presumption that his lode extends the full length of his claim. A subsequent and conflicting locator who sets up that the lode does not extend to the conflicting premises has the burden of proving this.

Weese v. Barker, 7, 178 (1883). Where a location certificate appears to be in compliance with the statute, a mistake by the recorder, who recorded the name "Farmer Boy" instead of "Tanner Boy," which did not mislead the subsequent locator, cannot avail the latter. Entering upon the premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession amounts only to a trespass, and cannot form the basis for the acquisition of title.

McGinnis v. Egbert, 8, 41 (1884). A subsequent locator cannot object that all the steps necessary to a valid location of a mining claim were not performed at the time of its location, provided they were afterwards performed before other rights attached. Where the description in the location certificate was insufficient because of its uncertainty, and a subsequent locator filed a certificate open to the same objection, and the original locator filed an additional certificate curing the defect, no right having attached to the subsequent locator, this additional certificate related back to the date of the original location. If work is resumed on a claim after it has been open to relocation, but before relocation is actually made, the rights of the original locators stand as they would if there had been no failure.

Proof that a stranger to the controversy appropriated as his own a claim which had been located, possessed, and improved by another, basing his right to do so upon a forfeiture of the rights of the original owner, would afford no presumption that the appropriation was lawful.

Pelican & Dives M. Co. v. Snodgrass, 9, 339 (1886). One who makes a discovery of mineral and runs a tunnel thereon, and does no other act towards completing the statutory location, and for four years does no labor thereon, acquires no interest therein as against intervening rights. Nor can he after the four years perform the remaining acts necessary to a statutory location and have them relate back to the date of the original discovery, there being intervening rights. The party who first discovers a vein and posts his discovery notice, following such acts with the remaining acts necessary to a valid location within the time prescribed by law, is entitled to the vein as against a subsequent discoverer who succeeds in first completing all the requisite acts of location.

The locator of an abandoned claim has the same length of time to perform each of the acts of the location as the original locator.

A vein having been discovered in a tunnel, and a claim having been located on the surface, which the locator supposed contained the apex of the vein, he subsequently discovered that the apex was outside the claim, and located another claim containing it. *Held*, this last was not a relocation but an original location.

Craig v. Thompson, 10, 517 (1887). Where one had long since abandoned any rights which he may have had in the mining claim, was not a party asserting any right in the action, and had not authorized any one to represent him, instructions asked by the defendant as to his rights were properly rejected. Where one has made a location valid in other respects but has filed an invalid certificate, an amended certificate filed before the defendant had acquired intervening rights would as to him relate back to and preserve the claim as originally located. The

defendant did not acquire intervening rights by acts done upon the land within the sixty days after plaintiff's discovery in which he was entitled to do his discovery work. The defendant was then a trespasser.

Doherty v. Morris, 11, 12 (1887). In an action on an "adverse claim," the fact that one of the original owners conspired with the person who located the property as an abandoned lode to make default on the assessment work, is immaterial when as a matter of fact the work was not done.

Omar v. Soper, 11, 380 (1888). The object of the statute in giving sixty days for sinking the discovery shaft was evidently to afford the miner time to sink his shaft, and to ascertain the true course of his lode, when he would be qualified to mark its boundaries on the surface. During this period a claim, if notice is posted which in addition to the statutory requirements specifies the extent of territory claimed along the vein on both sides of the point of discovery, is protected throughout its whole extent from invasion and adverse claims. No one can lawfully enter upon it during that period for the purpose of initiating a claim thereto; and no one can stand outside such appropriated territory and in any manner initiate a claim thereto capable of being rendered valid in the future by the happening of fortuitous circumstances, as by sinking a discovery shaft and locating another claim which overlaps the first.

Title to a lode in the actual possession of one who claims to own it, and who is engaged in developing it, cannot be initiated by others by a survey and recording of a location certificate.

Where two men discovered a lode, posted a notice, and began developing it, but before location was completed one transferred his interest to the other for a valuable consideration, and the transfer was accomplished by erasing one name from the notice, the other remaining in full possession and continuing the development, this was not an abandonment. The transfer, though irregular, was as against a subsequent locator effectual.

Johnson v. Young, 18, 625 (1893). Where land has become subject to relocation by reason of failure to do the annual work thereon, the owners of a junior overlapping location may acquire title to it by filing an additional certificate under the statute.

The burden of proving a forfeiture is upon him who asserts it.

Atkins v. Hendree, 1, 95 (1867). "The quartz law re-Idaho. quires, in order that a party shall have the benefit of its provisions in acquiring title to mining ground, that he shall stake off the ground, and if, as in this case, it is a single claim, there shall be a stake of a certain size driven at each end of the claim; that he shall post a notice containing certain requisites on said stakes; that within the time limited he shall have the same recorded in the proper office; and that all these acts being performed he shall be entitled to hold the ground so designated as real estate upon the condition that within one year he shall perform \$100 worth of labor in the development of the same. Now, if the plaintiffs performed these acts as required by law except the labor, and the year had not expired within which this was to be done, and the defendants undertook to take possession of the ground, they were trespassers, and the plaintiffs are entitled to their

remedy to recover possession." From the time of the lawful location of the claim the locator becomes the owner as against any other claimant of the soil. "It is true that the law allows him to hold only one lode by this location, but the fact that two ledges exist within these bounds must first be established before the subsequent claimant has any right to pass into them. If by going outside of these boundaries and tracing it into them he shows that another and distinct lode exists, then he may pass boundaries that would otherwise be sacred to the first locator."

King v. Edwards, 1, 235 (1870). "When mining ground Montana. is forfeited by any one, it again becomes unappropriated mineral lands of the United States. Any one who locates it in accordance with the mining rules and customs of the district in which the same is situated, has the rights of the government, and may proceed to declare a forfeiture, or may set up the defence of forfeiture in an action against him."

Meyendorf v. Frohner, 3, 282 (1879). A party in possession of mining ground under a title, subsequently determined in court as invalid, may, without fraud, relocate such ground and thereafter perfect such title in accordance with the United States laws.

Gonu v. Russell, 3, 358 (1879). A locator of a quartz lode having forfeited the same by reason of failure to perform the necessary labor, another entered upon the ground on July 3, 1877, posted a notice describing the claim by boundaries, marked the boundaries on July 19, and recorded the claim on July 20. On July 19, one hour before the marking of the boundaries, the original locator resumed work. His title was held good. "The law contemplates that the location of a mining claim shall consist of a number of distinct acts, which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists. The owner of a lode which has become subject to relocation can resume work thereon at any time prior to the performance of all these acts. The appellant could not make a valid location of the E. lode until he had marked the boundaries so that they could be traced readily by means of stakes, monuments, natural objects, or any other certain means. The resumption of labor in good faith by the respondent before the appellant perfected his location rendered null the prior acts of the appellant."

McKinstry v. Clark, 4, 370 (1882). Where defendant in ejectment claimed by virtue of two locations from a single discovery shaft, when one only could be valid, it was error to charge that upon plaintiffs who claimed by virtue of a relocation, rested the burden of proving which of the two was valid. "The right to the possession comes only from a valid location; consequently if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location."

Saunders v. Mackey, 5, 523 (1885). A tenant in common who enters into an agreement with his co-tenant, by which the latter is to do the required annual work, forfeits his interest in the claim if the work be not done. The claim becomes thereby open to relocation, and a valid location can be made by the tenant who made default.

Honaker v. Martin, 11, 91 (1891). The resumption of labor after failure to do assessment work and before relocation, in order to save the claim from relocation, under Rev. Stats. 2324, must be followed by a prosecution of the work with reasonable diligence until the requirement as to labor has been complied with. "The resumption of work by the original locator, whose rights are subject to forfeiture, without the expenditure, with reasonable diligence during the year, of the sum of \$100 for labor or improvements upon the mine, is an evasion of the statute."

It was held that upon the facts of this case there was not a resumption of work in good faith.

Golden Fleece G. & S. M. Co. v. Cable Con. G. & S. M. Co., Nevada. 12, 312 (1877). Where the first claimant who locates a claim is not a citizen, or had forfeited his rights by non-compliance with the mining laws, or has abandoned his claim, the mining ground staked off by him is open to relocation by any citizen as if no stake had ever been planted upon it.

Sever v. Gregovich, 16, 325 (1881). G. joined with S. in locating a mining claim, and afterwards recognized his claim, including a discovery claim of two hundred feet, as valid, and accepted from S. and his grantees their proportion of the expense of work upon the entire claim. G. subsequently located the entire claim in his own name, claiming that the original location was void, because the locators were not the discoverers of the lode, and S. was, at the time of the location, an alien. S. became a citizen before the relocation. Held, G. was estopped by his acts from denying the rights claimed by S. and his grantees as owners of an interest in the claim.

Rose v. Richmond M. Co., 17, 25 (1882), affirmed in 114 U. S. 576. "A party cannot locate a valid claim to a mining claim or lode already located and legally possessed by others." Such a location is absolutely null, and gives no right of possession.

Where parties locate an interest for discovery upon a lode previously discovered, but not known to be upon the same lode at the time the location is made, the location is not entirely void. If voidable at all, it is only so as to the extent of the discovery interest.

South End M. Co. v. Tinney, 35 Pac. 89 (1894). Where a person has abandoned his application for a patent and ceases to work his claim, it becomes open to relocation.

Wills v. Blain, 4, 378 (1889). Plaintiffs claimed under a location in 1880. Defendants claimed under a location in 1887, the last sentence of the recorded notice of which was, "This is a relocation of the claim known as the Dread Naught." This was an admission that the plaintiff's location was originally valid. "The relocater when he so describes himself in the notice solemnly admits, in an instrument which is made a matter of record, that he is not a discoverer of mineral but an appropriator thereof, on the ground that the original discoverer had perfected his right. The notice becomes in some sense an instrument of title—a record. It is the equivalent of an admission of record to the original locator that the relocater claims a forfeiture by reason of a failure on the part of the first locator to make his annual expenditure. This we believe to be the doctrine of *Belk v. Meagher*."

Warnock v. De Witt, 11, 324 (1895). A locator who has forfeited his claim by failure to do the required amount of annual work, may himself relocate the same ground.

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When application is made for a patent for a relocated claim, it must be shown that not less than \$500 has been expended thereon by the applicant or his grantors. *Copp*, 161 (1875).

When a mining claim has been entered and paid for, it is not subject to relocation by strangers between the date of entry and the date on which patent issues, on the ground of failure to perform annual work. Rev. Stats. 2324 refers solely to possessory titles. *American Hill Quartz Mine*, *Copp*, 237 (1879).

Where adverse relocations are made prior to the application for patent, controversies as to right of possession growing out of such relocations must be adjudicated in the courts. Where the alleged abandonment occurs subsequent to publication of notice of application for patent, and prior to payment and entry, the Executive Department will be compelled to take jurisdiction. *Wildman Quartz Mine*, *Copp*, 291 (1880).

Where a lode-mining claim has been located by several persons jointly, and thereafter the required expenditures have not been made, the claim may be relocated by one of the former claimants to the exclusion of his co-claimants.

Labor performed or improvements made by an original locator cannot be claimed by him as part of the expenditures necessary to entitle him to patent for the relocation. *Copp*, 300 (1881).

A claim is not subject to relocation in the interim between entry and issuance of patent for failure to perform annual work. *F. P. Harrison*, 2 L. D. 767 (1884).

A tortious entry is unavailable for the purpose of a valid location of a mining claim, and in Colorado, where adverse possession was obtained on a legal holiday by stealth when the locators were temporarily absent, and was retained by threats, it was in violation of the local statutes, although the locators were derelict in performing the requisite work, and gave no right of relocation. *McNeil v. Pace*, 3 L. D. 267 (1884).

In a claim located after May 10, 1872, failure to make the annual expenditure required by the statute renders the claim subject to relocation in the same manner as if no location of the same had ever been made, provided that work has not been resumed thereon after such failure, and before relocation. The forfeiture declared by the statute in such case is absolute, and the original locator will not be heard to question the validity of a relocation in a proceeding instituted to determine whether said relocater had complied with the law in the matter of the annual statutory expenditure. If the relocation is not legal, the illegality must be shown in the regular manner, in a proceeding instituted for that purpose. *Little Pauline v. Leadville Lode*, 7 L. D. 506 (1888).

An original locator will not be heard to question the validity of a relocation in a proceeding instituted to determine whether said locator has complied with the law in the matter of the annual statutory expenditure. *Sweeney v. Wilson*, 10 L. D. 157 (1890).

The B. Co. made application for patent, and furnished all the evidence necessary to entitle it to make entry, but through an oversight failed to pay the \$65 which under Rev. Stats. 2325 should have accompanied the application. Under belief that its entry was complete, it suspended work and failed for two years to do the annual labor required by the law. The claim was then relocated by one who applied for patent. The company discovering its default tendered the \$65, which was refused on account of the intervening claim. *Held*, that the claim had been abandoned and was open to relocation. *Ferguson v. Belvoir M. & M. Co.*, 14 L. D. 43 (1892).

The fact that an entry was cancelled, will not of itself render the ground subject to relocation. The original location is not affected thereby. *McGowan v. Alps C. M. Co.*, 23 L. D. 113 (1896).

CHAPTER XIII.

THE POSSESSORY TITLE OR TITLE BEFORE PATENT.

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| I. The Right of Possession. | | III. Conveyance of Mining Claims before |
| II. Action for the Possession of Mining Claims. | | Patent. Statute of Frauds. |

I. THE RIGHT OF POSSESSION.

ONE who has completed a valid location of a mining claim has a title to the land. It is not the complete legal title; that is still in the government, and is not acquired by the locator until he has received a patent for his claim. He has thus far only *occupied* a portion of those lands, which are declared open to "occupation and purchase" by Rev. Stats. 2319. The legal title is acquired only when that occupation is followed by purchase. But in the mean time he has a title good as against every one except the United States. This title is most often referred to in congressional legislation as the "right of possession," or the "right of possession and enjoyment." The locator of mineral land who has complied with the requirements of law and of the mining rules and regulations in force in the district, thereby becomes the assignee of the United States; a grant takes place, and a title vests in him. The fee remains in the government, but to him is granted the right of exclusive possession and enjoyment, to occupy, explore, and take therefrom the precious metals, and also the right, which it is his option to exercise or not as he pleases, to purchase the legal title from the United States.

This right of possession does not come from mere possession, or from the simple act of occupation. It "comes only from a valid location. Consequently if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location." Nor is residence or actual possession necessary for its protection. All that is necessary after a valid possessory title has been acquired is a compliance with such laws and regulations as are requisite to

preserve it from forfeiture, and the absence of any intention to abandon it.

This possessory title is a vested interest in real estate that will be protected by law, and cannot be divested by any one except the United States, which can do so by a repeal of the law creating it, or by any other legislative revocation of the grant. As such an interest, it is an estate in fee, inheritable, subject to the laws of descent and distribution of realty.¹ In fine, a mineral claim is property in the fullest sense alienable, inheritable. It may be the subject of taxation, and this without interference with the rights of the United States. It may be taken and sold in execution, and the purchaser steps into the shoes of the judgment debtor, he has the right of possession and enjoyment, as above defined, and the right, by taking the necessary steps required by law, to acquire a complete legal title by purchase.

The right of possession, however, is conditional, and the failure to perform the conditions subsequent prescribed by the statute terminates it; as does also an abandonment, or what is equivalent thereto, a conveyance. Dower, therefore, and analogous rights, if they can under any circumstances attach to the right of possession, are divested by the termination in any of these modes of the locator's title.

Where there is a conflict or dispute of title, priority of location confers the better title. A location made in pursuance of law, and kept alive by compliance therewith, will prevail over prior possession without location, provided it was peaceably made.

The remedial rules which affect the title to real estate are applicable to the possessory title to mining claims. A title may be thus acquired by means of the Statute of Limitations without proof of a valid location.² A mining claim may be the subject of an action of partition.

The rule that ejectment may be maintained against a trespasser or wrong-doer upon the strength of a prior possession, however short, has given rise to a kind of possessory title not resting upon location. This is the title of the mere occupant of mineral ground who is in actual possession, exploring

¹ Colorado, M. A. S. 456, 3613, 3618; possessory interest is not real estate. New Mexico, Comp. Laws 1884, sec. 2218; *Duffy v. Mix*, 24 Ore. 265, *post*, p. 338. but see Oregon, Hill's Ann. Laws 1892, sec. 3830. In this State it is held that the

² Rev. Stats. 2332; Arizona, Rev. Stats. 1887, sec. 2308.

or improving the same, which is good as against an intruder. This title covers only the ground in actual occupancy, the *pedis possessio*, unless the miner has defined a claim by distinct, visible, and notorious boundaries, in which case his possession is extended to his boundaries; or unless, by virtue of compliance with some regulation, he has acquired a right to a certain extent. These titles have no validity as against locations or patented claims, but as between mere occupants they give rise to another rule as to priority. Though priority of location confers the better title, yet when there is no location, and both parties rely on simple possession alone, priority of possession gives the better right. This right can only be retained by continued occupancy and use. The mere trespasser is without right, nor can he by his unlawful entry initiate a right. If, however, the prior possessor permits the entry of another who first discovers mineral and makes location, the title of the latter will prevail over that of the former. Of course, a title by mere occupancy cannot be enlarged by purchase from the government, except where a valid location has been previously made.

A possessory title, while it may not be divested by any one except the United States, may be avoided by the default of its owner, either by abandonment or by forfeiture for non-compliance with local regulations or with the statutory requirements as to annual labor. This subject has been considered elsewhere.¹

United States. *Sparrow v. Strong*, 3 Wall. 97 (1865). The value of a mining claim in Nevada may be the subject of estimate in money; and this court will take jurisdiction of a suit concerning such a claim, if of the requisite value, though the land where the claim exists has never been surveyed and brought into the market. Mining rights in the public lands are recognized by territorial authority, and have received the sanction of the federal government by acquiescence.

Forbes v. Gracey, 94, 762 (1876). A mining claim, that is, the possessory right of a miner to explore and work the mine under the existing laws and regulations on the subject, is property, and may be made by State statute the subject of a lien for unpaid taxes on the products of the mine. While the title to the land remains in the United States the holder of the claim has this interest, and is the owner of the minerals which he severs from the earth. The taxation of these and the subjecting the claim to a lien is not an interference with the interests, or any infringement of the title, of the United States.

Miller, J.: "Such right as the mining laws allow and as Congress

¹ Chapter XI.

concedes to develop and work the mines is property in the miner, and property of great value." "They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. This claim may be sold, transferred, mortgaged, inherited, without infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it."

Chapman v. Toy Long, 4 Sawy. 28 (1876), C. C. D. Oreg. Deady, J.: "Prior to the passage of the acts aforesaid concerning the mineral lands, strictly speaking, all persons who occupied them for the purpose of mining were naked trespassers, at least as against the United States. As between the first occupants and third persons, from the necessity and convenience of the case, the courts held that the former were not trespassers, and were entitled to the protection of the law as persons in the possession of portions of the public domain with the assumed assent of the owner. But under the mining laws of the United States now in force the locator of a mining claim, as to the right to the possession of the premises and to appropriate the minerals therein, becomes and is the assignee of the United States so long as the law remains in force and he complies with the conditions imposed by it. Until Congress withdraws this license by a repeal of the law, the right of the locator to the possession of his claim, and to appropriate to his own use the mineral deposits therein, is full and complete, and he need not take any steps to purchase the land or obtain a patent for it. That is a matter left to his own option or sense of self interest."

Campbell v. Rankin, 99, 261 (1878). "In actions of ejectment, or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction has always been held *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient (2 Greenl. Evid., sec. 321). If this right be the law when the right of recovery depends on the strict legal title in the plaintiff, how much more appropriate is it as evidence of the superior right of possession under the acts of Congress which respect such possession among miners."

Faxon v. Barnard, 2 McCrary, 44; 4 Fed. 702 (1880), C. C. D. Colo. One in actual possession of mining ground who has discovered and uncovered the lode, but has failed to take the other steps required by law to complete his location, cannot be ousted by a subsequent discoverer from the ground actually held by him. A location cannot be extended over a senior discovery in the actual possession of another.

North Noonday M. Co. v. Orient M. Co., 6 Sawy. 503; 11 Fed. 125 (1880), C. C. D. Cal. Where a party is in possession of a mining claim, claiming title under a conveyance by specific bounds, and is engaged in actually working the same within his lines as marked on the ground, a party entering upon such prior right is a trespasser, and can gain no right as against the possessor. "Independent of such constructive possession as the mining laws give by simple compliance with its provisions there was a continual actual possession

and occupation, upon which defendant could not enter without being a trespasser. The Supreme Court of California held that a mining claim in *actual* possession of the claimants is valid, irrespective of mining laws. *English v. Johnson*, 17 Cal. 107; *Table Mountain Co. v. Stranahan*, 20 Cal. 209; s. c. 31 Cal. 890; *Hess v. Winder*, 39 Cal. 355; *Rogers v. Cooney*, 7 Nev. 219. These cases have been cited and approved by the Supreme Court of the United States in the recent case of *Campbell v. Rankin*, 99 U. S. 261. And as I understand the recent decisions of the Supreme Court of the United States, under the pre-emption laws no man can initiate a pre-emption or other right under those laws by an entry upon the actual possession of another, be that other a competent pre-emptor or rightfully in possession as against the government, or otherwise. *Trenouth v. San Francisco*, 100 U. S. 251, 256; *Atherton v. Fowler*, 96 U. S. 513. If that be so, the principle is equally applicable to rights acquired in mining claims."

Belk v. Meagher, 104, 279 (1881). A valid location kept alive by the performance of the required work constitutes possession under the acts of Congress.

"The right to the possession comes only from a valid location. Consequently if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations."

"There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States. The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations' (sec. 2322), which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time."

Until such a location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by adverse entry thereon with a view to relocation.

Crossman v. Pendery, 8 Fed. 693 (1881), C. C. D. Colo. "A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession so held is good as a possessory title against all the world except the government of the United States. But if he stands by and allows others to enter upon his claim, and first discover mineral rock in place, the law gives such discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail." Miller, J.

Van Zandt v. Argentine M. Co., 8 Fed. 725 (1881), C. C. D. Colo. As between two locators, the boundaries of whose respective claims included common territory, priority of location confers the better title, provided a vein in place was discovered in the discovery shaft, and provided, also, that it extended to the ground in controversy.

Nor are the rights of the parties changed by the fact that the senior location was on the dip of the lode; the junior on the top, or apex.

Harris v. Equator M. & S. Co., 8 Fed. 863 (1881), C. C. D. Colo. A purchaser in possession of a mining claim under color of title may in time, under the Statute of Limitations, obtain a perfect title thereto as against all other persons, although unable to establish a valid location by his predecessors in title. Land upon which mineral was discovered in 1867 was worked from time to time by different persons. In 1876, upon a decree in chancery against the party, who was at that time and for some time previously had been in possession of and had worked the land, the claim was sold and a deed therefor made to one from whom the plaintiff derived title and under which possession was continued. The holder of this title upon the proof of these facts was entitled to a verdict in an action upon an adverse claim against the application for a patent of one who located his claim in 1879. "And it seems reasonable to allow him to maintain his possession and his right against one who seeks only to initiate a new claim to the same thing. In doing so the regulations respecting locations are not at all relaxed, nor is any condition on which the estate is held set aside. A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions, on failure of which it will be defeated, is not controlling. In general, we apply to mines in public lands the rules applicable to real property, as that it may be conveyed by deed, is subject to sale on execution as land, descends to the heir of the claimant and not the personal representative of his estate, and so on. No reason is perceived for denying the force and effect of the rule under consideration as applicable to such property. This view is accepted in California, and I have not found any authority against it. *Attwood v. Fricot*, 17 Cal. 38; *Hess v. Winder*, 30 Cal. 349." Hallett, J.

Sparks v. Pierce, 115, 408 (1885). Mere occupancy of the public lands and improvements thereon without title or attempt to secure title, give no vested rights as against the United States or any purchaser from them.

Hamilton v. Southern Nev. G. & S. Min. Co., 33 Fed. 562 (1887), C. C. D. Nev. The locator of a mining claim under the United States laws, prior to the actual payment of the purchase-money and the issuance to him of the receipt therefor by the Land Department, possesses a mere privilege to purchase the property, and a constable's sale of the mine before payment only passes that privilege. "If the sale is valid, the purchaser can only step into the shoes of the execution debtor, and thereby obtain a right to go on, perform the necessary acts, pay the purchase-money, contest the rights of other adverse claimants, and make the entry and receive the certificate of purchase himself. If the judgment debtor subsequently performs these acts himself and receives the title from the government, a new and further title becomes vested in the judgment debtor which does not pass by virtue of the officer's deed."

Glacier Co. v. Willis, 127, 471 (1888). A complaint in ejectment for a mine in Colorado which alleges a valid and legal location by those under whom the plaintiff claims, and possession and occupation by the plaintiff for more than five consecutive years (the period prescribed by the Statute of Limitations) prior to the ouster, and payment of taxes by him during that time, sets up a sufficient claim to title as against everybody except the United States.

Manuel v. Wulff, 152, 505 (1894). Mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States; and when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession. On a transfer the claim passes to the grantee, not by operation of law, but by virtue of the conveyance. The alienage of the grantee is therefore open to question by the government only.

Black v. Elkhorn M. Co., 163, 445 (1896). B., being the owner of an interest in a mining claim, conveyed it by an instrument in which his wife did not join. The successor in title of the grantee obtained a patent, and the widow of B. claimed a right of dower in the patented claim. *Held*, she had no dower therein.

"The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfil which forfeits the locator's interest in the claim. We do not think that under the Federal statute the locator takes such an estate in the claim that dower attaches to it.

"To sum up as to the character of the right which is granted by the United States to a locator, we find: (1) That no written instrument is necessary to create it. Locating upon the land and continuing yearly to do the work provided for by the statute gives to and continues in the locator the right of possession as stated in the statute. (2) This right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work, or if, being one among several locators, he neglects to pay his share for the work which has been done by his co-owners, his right and interest in the claim may be forfeited to such co-owners under the provisions of the statute. (3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

"An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. *Snell v. Levitt*, 110 N. Y. 595, and cases cited at p. 603 of opinion of Earl, J.; *White v. Manhattan Railway Co.*, 139 N. Y. 19. If the locator remained in possession and failed to do the work provided for by statute, his interest would terminate, and it appears to be equally plain that if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right

provided by the statute would terminate under such circumstances. If he convey to another a right which may be thus lost, that conveyance would seem to be equivalent to an abandonment by him of all rights under the statute. What could be better evidence of an intention to abandon than an actual conveyance of his right to another, ceasing to do any work thereon, and the giving up of his possession in accordance with his conveyance? The abandonment by simply leaving the land is no more efficacious than conveying his rights and also leaving possession without any intention of returning. His simple abandonment would leave no right remaining in his wife to claim dower upon his death in the interest thus abandoned. If he add a conveyance as a clearer evidence of abandonment, her alleged right to dower is not strengthened."

Rush v. French, 1, 99 (1874). Before May 10, 1872, **Arizona.** possession and occupancy so long as they continued were sufficient to hold a mining claim against one attempting to make a subsequent location. "If the miners had legislated upon the subject, and in their local assemblies, known as miners' meetings, had adopted a law that mere possession should not hold against a party regularly locating under the laws, then such possession would not prevail as against such subsequent location, but in the absence of such law — and its absence is presumed until the contrary is shown — actual possession is good as long as it lasts."

"Up to May 10, 1872, there was generally no limit to the power of the local legislatures known as miners' meetings, except the general principles of law. During this time, then, actual possession was good so far as it did not claim more than the law allowed, it not being shown that a failure to comply with the rules by posting a notice, recording, working, etc., was of itself declared to work a forfeiture."

Field v. Grey, 1, 404 (1881). A party having located a mining claim, and being in possession thereof, may hold the surface, while he is continuously seeking a vein or lode believed to exist therein, as against all parties having no better right thereto, and may eject them therefrom if they intrude upon his possession.

Merced Min. Co. v. Fremont, 7, 317 (1857). **California.** owner of a mining claim has in practical effect a good vested title to the property, and should be treated so until his title is divested by the exercise of the higher right of his superior proprietor, the State.

McKeon v. Bisbee, 9, 137 (1858). The interest of a miner in his mining claim is property, and may be taken in execution. He has in addition to the right of exclusive possession and enjoyment the right of absolute disposition, and may sell, transfer, or hypothecate without hindrance from any one.

State v. Moore, 12, 56 (1859). The interest of the owner of a mining claim is property, and under the constitution is liable to taxation by the State. The exemption from taxation of government property ceases when public land becomes private property by occupation.

The legislature having exempted mining claims from taxation, a purchaser is not liable to a tax upon the amount of the purchase-

money as capital invested or employed in any trade, commerce, or business.

Attwood v. Fricot, 17, 37 (1860). Mining claims are held by possession, but that possession is regulated and defined by usage and local and conventional rules, and the actual possession which is applied to agricultural land cannot be required in case of a mining claim in order to give a right of action for invasion of it.

A mining claim must in some way be defined as to limits before the possession of or working upon parts gives possession to any more than the part so possessed or worked. When the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the entire claim.

So if a party enters upon a mining claim *bona fide* under color of title, as under a deed or lease, the possession of part as against any one but the true owner or prior occupant is the possession of the entire claim described by the paper, and this though the paper did not convey the title. The condition of the possessor in such instances, independently of mining rules as to forfeiture and abandonment, is no worse than that of the occupant of other real estate, in which case the above-stated principle applies.

English v. Johnson, 17, 107 (1860). In an action for mining claims, the court charged in effect that possession taken of a mining claim without reference to mining rules was sufficient to maintain the action as against one entering by no better title, and that the possession need not be evinced by actual enclosure; but if the ground was included within distinct, visible, and notorious boundaries, and if plaintiffs were working a portion of the ground within those boundaries, this was enough against one entering without title. *Held*, that the instruction was right, that though the regular and usual way of obtaining possession of mining claims be according to the mining regulations of the vicinage, still a possession not so taken is good against one taking possession in the same way, and that the actual prior possession of the first occupant would be better than the subsequent possession of the last.

Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on or of a part, and though the party does not enter in accordance with mining rules or under a paper title. The rule which applies to agricultural lands does not apply to such a case. Fences are not required around mining claims. The physical marks upon and around the claim are to notify every one of the possession and claim of the possessor; and by common understanding the going upon a claim to work it is an appropriation of the entire claim, especially if that claim can be appropriated to that extent by location by one man.

Hughes v. Devlin, 23, 502 (1863). A mining claim is an estate of inheritance. It is real property, and as such may be the subject of an action of partition under section 264 of the Practice Act.

Hess v. Winder, 30, 349 (1866). One who claims a tract of mining ground for mining purposes on the public domain, but is actually occupying and working only a part of it, cannot recover damages for

an entry by a stranger upon the tract beyond his actual occupancy, unless his boundaries are plainly indicated by such distinct physical marks or monuments as will fairly advertise to all concerned where and what it is, or, in other words, its extent, or there is some mining custom allowing his possession to extend to the ground so entered on.

If a party relies upon a constructive possession by deed, he must show himself in actual possession of a part of the described land, and the description must be definite and certain as to the boundaries of the land. If the deed does not contain such boundaries which can be located, marked out, and made known, it cannot have the effect to extend the possession beyond the *possessio pedis*, which is definite, positive, and notorious.

Pralus v. Jefferson G. & S. M. Co., 34, 558 (1868). To maintain an action to quiet title to mining claims on the public domain under section 254 of the Practice Act, the plaintiff must aver possession, and establish an actual or constructive possession in himself at the time of commencing the action. In such case constructive possession can only be established by the proof of three facts: 1, that there were local mining customs, rules, and regulations in force in the district embracing the claim; 2, that particular acts were required by such mining laws or customs to be performed in the location and working of claims as authorized by such laws; 3, that plaintiff has substantially complied with these requirements.

Bradley v. Lee, 38, 862 (1869). The fifth objection to the instruction is, that it assumes that mining claims are open and subject to appropriation in case the mining laws in relation to working them are not observed, although the claims may be in the actual possession of other persons.

"The language in the instruction 'open and subject to appropriation under the local usages of the district' does not necessarily imply that a mining claim in the actual possession of a person may be relocated by another person, if the person in possession has not performed the amount of work on the claim required by the mining regulations in order to give him the constructive possession of the claim. Such regulations are devised for the purpose of enabling persons who locate claims to hold them by constructive possession; and they are not to be construed as authorizing a person to invade the actual possession of another on the pretext that the latter has neglected to perform the requisite amount of work, or has failed in some other respects to comply with such regulations. Such constructive possession is no higher evidence of title than actual possession. We do not construe the instruction as laying down a rule opposed to this view of the purpose of mining rules and customs."

Gelcich v. Moriarty, 53, 217 (1878). To support a decree quieting title based upon actual possession of mining ground, where both parties, having attempted to make location after the passage of the act of 1872, have failed to do so properly, it must appear that plaintiff has had possession of a definite part of the ground.

Funk v. Sterrett, 59, 613 (1881). Since the passage of Rev. Stats. 2324, a party can show a right to possession of a mining claim (when

no patent has been issued) only by showing an actual *possessio pedis* as against a mere wrong-doer, or by showing a compliance with the requirements of the act of Congress.

Horswell v. Ruiz, 67, 111 (1885). Prior occupation and working of mineral lands of the United States, without complying with the requirements of any law, federal, district, or local, does not give a right of possession as against one who afterwards *peacefully* locates a mining claim covering the same ground, and complies in all respects with the federal and district mining laws. From the time the second person has perfected his location the prior occupant is a trespasser.

Garthe v. Hart, 73, 541 (1887). When a prior location of a mining claim is valid, and the locators have kept it so by complying with the requirements of the laws, a subsequent location, however regular in form, is of no effect. One having prior possession of a piece of mining ground is entitled thereto as against an intruder, but not as against one who has subsequently located the same in compliance with the mining laws.

Champion M. Co. v. Consolidated Wyoming G. M. Co., 75, 78 (1888). For the purpose of determining the question of priority of location under Rev. Stats. 2336, a possessory title, under general mining customs and the laws of the State and United States on the subject, is as good as a patent.

Neubeaumer v. Woodman, 89, 310 (1891). Although the locator of a mining claim failed to mark his location on the ground so that its boundaries could be readily traced, yet if he by deed conveyed the whole claim by metes and bounds, the grantee, who has entered into possession of a part thereunder, has a constructive possession of the whole as described, and may maintain ejectment against an intruder who attempts to make a location, but also fails to mark his location upon the ground.

Sullivan v. Hense, 2, 424 (1874). Plaintiffs in ejectment who seek to recover a mining claim upon the strength of their paper title, there being nothing to show that they or their grantors were ever in possession, must prove a valid location according to the rules, usages, and customs of the district prevailing at the time when the location was made.

Armstrong v. Lower, 6, 581 (1883). Under the Federal and State statutes two kinds of possessions of mining ground are recognized: 1. Where the miner, by virtue of work and improvement upon a tract of mineral land and occupancy thereof, holds the same independent of location statutes against one having no better right. 2. Where, after discovering a vein, the miner undertakes to avail himself of the benefits of the location statutes. When he has complied with the requirements of the statutes his possession of the entire claim remains until he does or omits something which in law amounts to an abandonment thereof. But if he fails to comply with these statutes all that portion of the location of which he is not in actual possession is open to exploration and location by others.

Sweet v. Webber, 7, 443 (1884). The right to possession comes only from location. Possession without location carries no title. The mere naked possession of a mining claim upon the public lands is

not sufficient to hold such claim as against a subsequent location made in pursuance of the law and kept alive by a compliance therewith.

Strepey v. Stark, 7, 614 (1884). To constitute such possession under the statute as will give the locator a right to mineral lands before patent issues, neither residence on the premises, nor continued actual possession, nor the kind of possession denominated *possessio pedis*, is required.

Keeler v. Trueman, 15, 143 (1890). A mining claim is real estate, and descends to the heirs of the owner. Consequently where an administrator filed an adverse claim to an application for a patent, and began suit thereon, alleging a title by location in his decedent, a demurrer to the complaint was sustained on the ground that he was without interest. The rights of the decedent in the claim descended to his heirs.

McFeters v. Pierson, 15, 201 (1890). "A mining claim on the public domain is real property, and the subject of complete ownership as a claim, and the locator thereof or his successor in interest, having fully complied with the terms prescribed by Congress for acquiring title to mineral lands, is, so long as he continues such compliance, the owner of the claim for all practical purposes."

In an action of trespass, proof of title by location is a sufficient compliance with an allegation of ownership of a claim. It is not necessary to show title by patent.

Carrhart v. Montana Mineral Land & M. Co., 1, 245 Montana. (1870). Quartz claims are real estate, and are subject to the laws governing descent and distribution of realty.

Robertson v. Smith, 1, 410 (1871). It will be presumed in the absence of evidence that the parties in possession of mining claims hold them according to the local rules and customs of the district.

"When a miner locates a particular portion of mining land in accordance with these rules and customs, then the grant from the general government to occupy, explore and take therefrom the precious metals accrues to such miner over the ground located. . . .

"While the general government then holds the fee in the land upon which these mining claims are situated, it had parted with an incorporeal hereditament in the same, that is, the right to occupy, explore and extract the precious metals therefrom; and these rights have been vested in the plaintiffs by virtue of a grant from the general government; hence these mining claims are no longer to the full extent public lands. The title in fee is; but these rights, which were incident to the fee, have been carved out of it, and are no longer government property but that of the plaintiff, and it is property which the law will protect."

McKinstry v. Clark, 4, 370 (1882). Where defendant in ejectment claimed by virtue of two locations from a single discovery shaft, where only one could be valid, it was error to charge that upon the plaintiff, claiming by virtue of a relocation, rested the burden of proving which of the two was invalid. "The right to the possession comes only from a valid location, consequently if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location."

Grepper v. King, 4, 367 (1882). When the rules and customs of a mining district are not in conflict with the laws of the United States or the Territory, they become a part of the law of the land, and when they are complied with in the taking up and locating of mining ground, a grant from the government follows and title vests in the locator. "The possessor of real estate is presumed to be the owner thereof until the contrary appears; and a like presumption of title arises in favor of the possessor of a mining claim in a mining district."

Noyes v. Black, 4, 527 (1883). One in actual possession cannot by virtue of possession alone hold mining ground as against a valid location of the same ground. There is no grant from the government under the act of Congress, unless there is a location according to law and local rules and regulations.

Such location is a condition precedent to the grant. Mere possession, not based upon a valid location, would not prevent a valid location under the law. *Belk v. Meagher*, 104 U. S. 284, followed.

Hopkins v. Noyes, 4, 550 (1883). "Possessory titles do not live upon possession alone. They must be supported by proof of a compliance with the law that gives the right to and sustains the possession. The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location, made in pursuance with the law and kept alive by a compliance therewith. Hence, we say, that upon an issue joined as to the forfeiture of the right to the possession of a mining claim by reason of failure in complying with the rules and regulations of the district as to representation, etc., proof of the actual possession, or of the delivery of such possession, from the date of the location to the trial of the issue, if unaccompanied by testimony showing that such possession was taken and held under and by virtue of a compliance with the local rules and regulations of the district, is immaterial proof."

Garfield M. & M. Co. v. Hammer, 6, 53 (1886), affirmed in *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291 (1889). The right to the possession of a mining claim is derived only from a valid location, consequently, if there be no location, there can be no possession under it. In an action to quiet title to a mining claim, where plaintiff's ownership and right of possession are put in issue, he must show affirmatively that he had complied fully with all the requirements of the act of Congress and the local rules and regulations relative to the location of mining claims, and had made a valid location.

Milligan v. Savery, 8, 129 (1886). Titles to mining claims before the government has parted with its title therein are merely possessory, and the office of an adverse claim to an application for a patent is to have determined the right of possession.

Hale & Norcross G. & S. M. Co. v. Storey County, 1, Nevada, 105 (1865). The possessory rights of a miner are an estate in fee, and as such subject to taxation by the State. Such taxation is not in violation of the section of the Organic Act which prohibits the territorial legislature from taxing the property of the United States.

Mallett v. Uncle Sam G. & S. M. Co., 1, 188 (1866). In the

absence of mining laws, the miner locating a claim holds only by actual occupancy and by such working for the development of the mine as would under all the circumstances be deemed reasonable, and his right of possession can only be continued by occupancy and use.

Rogers v. Cooney, 7, 213 (1872). A party who enters upon vacant public land, makes a survey and record, marks the boundaries of his claim, builds a cabin thereon for storing of tools, and continuously thereafter engages in digging and milling the tailings which have been deposited on the land, thereby acquires such a possessory right to the land as will enable him to maintain trespass against an intruder who enters upon the land and begins to remove such tailings. Possession taken of a mining claim without reference to mining rules is sufficient to maintain an action against one entering by no better title. Such possession need not be evidenced by actual enclosure; but if the claim be included within distinct, visible, and notorious boundaries, and if a portion of it is worked within such boundaries, it is sufficient against one entering without title.

Patchen v. Keeley, 19, 404 (1887). In trespass *q. c. f.* for digging and removing ore, the evidence for the plaintiff tended to show that he had discovered and located his mining claim under the laws of the United States and the Ely mining district, and was in actual possession at the date of defendants' alleged wrongful entry. Defendants did not attempt on cross-examination to inquire into the nature of plaintiff's possession or to show title in themselves. *Held*, nonsuit improperly granted. Plaintiff was not bound to prove discovery of a lode. As against a stranger, possession is sufficient to maintain trespass, — the same possession as if the land were farming or timber land. The location of a claim need not be proved.

Roberts v. Wilson, 1, 292 (1876). A party claiming ground **Utah.** not actually possessed and worked, — ground beyond the *possessio pedis*, — must show his rights thereto by constructive possession; and he can show such constructive possession only by distinct physical marks or monuments, or by local rules and his compliance therewith.

Blake v. Butte Min. Co., 2, 54 (1877). One who makes a valid location of a mineral lode, complying with all mining laws, local and national, obtains a vested right to such property of which he cannot be divested.

Eilers v. Boatman, 3, 159 (1881). "It is sufficient to give a right to the occupants of mining ground on the government domain which the courts will protect, to establish by evidence its appropriation by means which are a substantial compliance with the law upon that subject, and which in view of the surrounding circumstances will give notice to those who have a right to know, that the particular mining ground is subject to the dominion and control of some private claimant."

Donahue v. Johnson, 37 Pac. 322 (1894). A general **Washington.** allegation of ownership of a mining claim is substantiated by proof of location and possession thereunder.

"A mining claim is a license extended by the United States to

individuals to take minerals from certain areas of public lands, the possession of which is secured to the licensee by complying with the laws and mining rules. One who locates and takes possession of and works a claim of this kind is the owner of it, although the legal title to the land may remain in the United States."

II. ACTION FOR THE POSSESSION OF MINING CLAIMS.

Mining claims being real estate, their possession is restored to the rightful owner, or preserved in him, by means of the usual actions for enforcing the title to real property. The owner out of possession may maintain ejectment for his claim, or whatever action is provided by the law of the State as a substitute therefor.¹ If he is in possession, he may maintain an action to quiet the title, where such an action is recognized.

These actions are of course governed by the peculiar remedial law of each of the States, but those principles of the remedial law that are of general application are subject in this instance to certain modifications, of equally general recognition.

The rule that the plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's, has been to an extent qualified and limited by reason of the character and nature of the title of the owner of a mining claim. In ejectment for such a claim, it is not a sufficient answer to show that the legal title is in the United States. If the plaintiff shows a valid possessory title, either by compliance with the statutory requirements as to location and the rules and regulations of the district, or by appropriation and actual possession, either *pedis possessione*, or by marking of boundaries, as described above, he may recover, unless the defendants can establish a better title. Thus the rule has been stated to be *that the better title prevails*, the general rule in ejectment having no application. The original position was to assume a grant from the government to the first proprietor, and to treat that as the basis of title. Mr. Justice Miller does not admit this to be an exception to the general rule. In *Reynolds v. Iron Silver Min. Co.* he says: "Even when the plaintiff recovers on proof of priority of

¹ See Colorado, M. A. S. 3613; New Mexico, Comp. Laws 1884, sec. 1570; Act Feb. 1, 1887, p. 204; Act Feb. 28, 1889, p. 276. Oregon holds out against this view on the ground that the possessory interest is not real estate. *Duffy v. Miz*, 24 Oreg. 265, *post*.

possession, it is because in the absence of any title in any one else, this is evidence of a title in the plaintiff." This seems to be a sound view. That proof of prior possession is sufficient to justify a recovery against a trespasser has never been considered inconsistent with the principal rule, where the right of recovery depends on the strict legal title in the plaintiff; and there seems to be no reason why a possessory title of a higher order should not give its holder an equal advantage as against an intruder upon his possession without contravening the general rule.

It is, however, on the other hand contended in Colorado and California that adherence to language adapted only to cases where the strict legal title is involved, merely serves to embarrass the solution of the question. "Practically, the real question involved in all such cases is which, as against the other, has the better right to mine the land in question." Thus the real question involved in an action for the possession of a mining claim is not whether the plaintiff has a strict legal title, indefeasible as against the whole world, but *whether he has a better right to possession than the defendant*. The title which enables him to recover in one action may not be available to him in another against another adversary, or, if available, may not be sufficient. His possession is, therefore, essentially different from that of a plaintiff in ejectment, as generally regarded. This view, it will be noted, was first put forth before the United States had given a legal recognition to the title of the miner on the public domain. After the mining acts were passed, he may be said to have a legal title. It is such a title as may be enforced by a possessory action on the law side of the court.

The state of the law which had already been established by the courts of California was sanctioned by Congress in the act of Feb. 27, 1865, Rev. Stats. 910. "No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession."

It is not even necessary to deraign title from the original locator, if without doing so the plaintiff can establish a better right than the defendant, as, for instance, a possession at the time of the latter's entry. Where both parties derive title from the

original owner, the validity of his title is, of course, not in question. Where there is a recorded certificate of location, it is evidence of the date of location, the description of the claim, and of the fact that the requirements of making and recording a certificate have been complied with. The other steps necessary to a valid location must be proved by evidence outside of the certificate. Plaintiff is not obliged to negative the forfeiture of his right. That is matter of defence which must be pleaded and proved; but if plaintiff himself does show that his right was forfeited and the ground relocated by others, he will be nonsuited. And if he shows title in the defendant, he must show a title in himself derived therefrom, or that the land became open to relocation. He may not deny the defendant's title, which he has himself shown.

The possessory title to a mining claim, being real estate, may be made the subject of an action to quiet title. In such an action the defendant must either deny and disprove the validity of the plaintiff's location, or he must show an abandonment or forfeiture followed by the acquisition of rights in the claim by himself. The question for decision in such an action is, which party has complied with the requirements of the law and was prior in time. An action for the recovery of a mining claim raises a question of title to real property, within the meaning of an act prohibiting the submission of such questions to arbitration.¹

United States. *Mining Co. v. Taylor*, 100, 37 (1879). In ejectment for an undivided interest in a mining claim in Nevada, where both parties derive title from the original owner, the validity and regularity of his location are not in question.

Aurora Hill Con. M. Co. v. 85 M. Co., 34 Fed. 515 (1888), C. C. D. Nev. Under Rev. Stats. 910 it is not necessary for plaintiff in ejectment to establish legal title in himself. It is sufficient as a general rule to show right of immediate possession, and as against trespassers prior possession will support the action.

Reynolds v. Iron S. M. Co., 116, 687 (1886). In an action to recover part of a lode or vein of mineral, plaintiff relied on a patent for a placer claim. Defendant asked the court to charge: "The plaintiff must recover on the strength of his own title. If the vein is not conveyed to plaintiff by the placer patent under which they claim, then it makes no difference whether defendant has any title or not: the plaintiff cannot recover on the weakness of defendant's title." It was error to refuse to give this instruction.

Miller, J.: "This is the fundamental principle on which all actions

¹ In addition to the following cases consult also cases under Div. I., this chapter.

of ejectment rest. Even where the plaintiff recovers on proof of priority of possession, it is because, in the absence of any title in any one else, this is evidence of a title in the plaintiff. If there is any exception to the rule that in an action to recover possession of land the plaintiff must recover on the strength of his own title, and that the defendant in possession can lawfully say 'until you show some title, you have no right to disturb me,' it has not been pointed out to us."

Glacier Co. v. Willis, 127, 471 (1888). In ejectment for the possession of a mine in Colorado, the property claimed was described as follows: "Commencing at the base of said mountain east of Bear Creek, and running southeast and parallel with Coley tunnel through said mountain five thousand feet from the mouth or starting point of said tunnel at a stake marked and in or at the mouth of said S. G. tunnel, and two hundred and fifty feet northeast and two hundred and fifty feet southwest from said stake or tunnel to its termination." This is sufficient. It is not necessary to describe the property by its legal subdivisions or by metes and bounds. "The provisions of State statutes as to the description of the premises by metes and bounds, have been held to be only directory, and a description by name where the property is well known is often sufficient."

The complaint, after describing the land and tunnel therein, averred that "the said tunnel claim so located embraces many valuable lodes or veins which have been discovered, worked, and mined by the plaintiff and its grantors." *Held*, this was a sufficient description of the lodes for which recovery was asked.

Hammer v. Garfield M. & M. Co., 130, 291 (1889). It being established, in an action to quiet a mining title in Montana, that the plaintiff was in quiet and undisputed possession of the premises, the validity of his location not being questioned in the pleadings, and that the boundaries of his claim were so marked on the surface as to be readily traced, this constitutes a *prima facie* case which can only be overcome by proof of abandonment, or forfeiture, or other divestiture, and the acquisition of a better right or title by the defendant.

Haws v. Victoria Copper M. Co., 160, 303 (1895). White, J.: "The elementary rule is that one must recover on the strength of his own, and not on the weakness of the title of his adversary; but this principle is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence."

Rush v. French, 1, 154 (1874). "In California and other Arizona. mining countries on the Pacific slope the general government refused for a long time to grant any title to the mineral lands, but tacitly acknowledged a license to work the mines, raising a kind of tenancy at will in the first occupier. The courts found it necessary to declare that this *bona fide* occupation should be sufficient to maintain an ejectment against any one not connecting himself with the paramount title, that the possessory title sufficient to maintain the action vested in the first possessor and flowed from him. The defendant was not prevented from showing that the possessory title was outstanding in another, but merely showing that the paramount title in fee was in the government was not sufficient."

"There are two kinds of possessory rights recognized in this Territory, one based on the act of Nov. 9, 1864, Comp. Laws, 536; the other resting on mere prior occupation. To maintain a right under the first, plaintiff must show a compliance with the requirement of the statutes; to succeed under the second, he must show prior possession without alienation or abandonment, down to the time of the entry complained of."

Blake v. Thorne, 16 Pac. 270 (1888). A person from whom title to a mining claim has been derived by conveyance is estopped from asserting that the claim was not legally located.

Merced Mining Co. v. Fremont, 7, 317 (1857). A party in possession of a mining claim may, under section 254 of the Practice Act, maintain an action to determine the adverse claim of a party out of possession. That section provides that "an action may be brought by any person in possession of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate, or interest."

Waring v. Crow, 11, 366 (1858). In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendants who are in possession of such claim holding other undivided interests, and who claim no right to the interest sued for.

Smith v. Doe, 15, 100 (1860). The mere allegation of possession is not sufficient to recover in ejectment against one who has in good faith located upon public mineral lands for the purpose of mining. All land is presumed to be public land until legal title is shown to have passed from the government to private parties.

Pennsylvania Mining Co. v. Owens, 15, 135 (1860). "The defendants were, and for a long time had been, in possession of the ground, and actually engaged in mining upon it, and until a prior and paramount right was shown to exist in the plaintiffs they could rest securely upon their possession, and were not required to show anything beyond it."

The instructions that the jury should find for the plaintiffs if they located their claim before the defendants located theirs, or if they found that defendants had never located any claim adjoining plaintiff's claim, are erroneous, and are in conflict with the rule that plaintiff must recover upon the strength of his own title.

Coryell v. Cain, 16, 567 (1860). The rule that plaintiff in ejectment must recover on strength of his own title, and not on the weakness of his adversary's, is subject to an exception in the case of mineral lands. Although the larger portion of mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, privileges, and the like, by showing the paramount title of the government. The courts, in determining controversies of this character, presume a grant from the government to the first appropriator. This presumption, though of no avail against the government, is absolute in such controversies.

Lentz v. Victor, 17, 271 (1861). When a man enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing: 1st, that the land is public; 2d, that it contains mines or minerals; 3d, that the person

entering upon or against a prior possession enters for the *bona fide* purpose of mining. In ejectment these must appear affirmatively in the answer with the requisite averments to show a right under the statute or by law to enter.

Grady v. Early, 18, 108 (1861). A description in a complaint in ejectment is sufficient wherein the ground is described as being located upon a certain river at the mouth of a certain cañon in a certain township, and as known by a certain name, the length and width thereof being stated, and the name of the claims which bound it on either side.

Antoine Co. v. Ridge Co., 23, 219 (1863). In an action to recover mining claims it is not necessary for plaintiffs to design title from the original locators, even though that title was alleged in the complaint. It is sufficient for them to show that they were owners, and in possession at the time of the defendant's entry. They need only prove a better title to the possession of the premises than the defendant.

Richardson v. McNulty, 24, 339 (1864). In ejectment for a mining claim it is not error to charge that the plaintiff must recover on the strength of his own title. "In other words, the plaintiff must show a right in himself, although there be none in the defendants." "If the plaintiff, however, has shown a right in himself in the property in dispute, then, however weak his title appear, he must recover if it be better than the defendant's title."

"Ejectments for mining claims, where neither party has, strictly speaking, any legal title, but both, in strict law, are intruders upon what belongs to another, are mere contests for possession, and their solution is only embarrassed by an attempt to adhere to language only adapted to cases where the strict legal title to land is involved. Such ejectments might be more properly called actions to determine the right to mine in a certain locality. Practically, the real question involved in all such cases is, which, as against the other, has the better right to mine the land in question. Generally the solution of this question depends in a great measure upon the rules and regulations of the mining district in which the ground is located, established by the miners themselves, and not infrequently its just solution is prevented rather than aided by an adherence on the part of counsel and courts to a phraseology hardly applicable when the character of the right involved is considered."

Pralus v. Pacific G. & S. M. Co., 35, 30 (1868). A mere possessory title to a claim on the public domain is sufficient to authorize an action by a party in possession to determine the adverse title or claim of a party out of possession. The allegation "that by means of the false representations and pretences aforesaid of the said defendant they are greatly embarrassed in the free enjoyment, use, and disposition of their said described mining claim. . . . And that the interest of these claimants in said mining claim is greatly depreciated by reason of the possibility of title in this defendant resulting from and growing out of said false and pretended claims," is sufficient averment of injury, under the statute, resulting from such adverse claim, to sustain the action. Where the defendant in such a case in a supplemental answer set up abandonment and forfeiture by plaintiff, but fails to set up any subsequently acquired rights in the claim by himself, these matters are unavailing as a defence.

Spencer v. Winselman, 42, 479 (1871). An action for the recovery of a mining claim on public lands raises a question of title to real property in fee, and therefore cannot be submitted to arbitration under section 380 of the Practice Act.

Frank v. Sterrett, 59, 613 (1881). An action to quiet title is not like an action of ejectment, where a plaintiff must recover on the strength of his own title. The true question for decision in such an action is, which party has complied with the requirements of the law and was prior in time, not which, on the whole, had the better right.

Belcher Consolidated G. M. Co. v. Deferrari, 62, 160 (1882). In ejectment for a mining claim, plaintiffs having shown title by deed from defendants and others, defendants are estopped from denying that they were owners at that time. They can only defeat this title by showing a subsequently acquired title in themselves.

Murphy v. Cobb, 5, 281 (1880). Where a plaintiff in an action to recover mining ground, by his own testimony shows that the ground belonged to the defendant, and fails to show that it was open to relocation, evidence of such location by plaintiff and his grantors is inadmissible.

Müller v. Taylor, 6, 41 (1881). In an action for restitution of mining property under sec. 10, chap. 48, Gen. Laws, the plaintiffs alleged that they had been ousted of their possession before the expiration of the time within which they had to comply with the statutory requirement of marking and recording their claims, and that they were prevented by the threats of the defendants from complying with these requirements. A demurrer, on the ground that the plaintiffs in their complaint did not show a compliance with the statutory requirements, will be overruled. One who prevents a thing being done may not avail himself of the non-performance.

Lebanon M. Co. of N. Y. v. Consolidated Republican M. Co., 6, 371 (1882). Proof of actual possession of mining claim under color of title at the time of defendant's entry is enough upon which to recover in ejectment. The strictly legal title being in the government is not involved. The doctrine that plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's, does not apply.

Strepey v. Stark, 7, 614 (1884). The rule in ejectment that plaintiff must recover upon the strength of his own title, and not on the weakness of his adversary's, does not apply in possessory actions for mining claims. In these the better title prevails.

Four things are necessary in order to perfect the location: (1) Sinking of a discovery shaft; (2) posting a discovery notice; (3) marking the surface boundaries; (4) making and recording a location certificate. To establish a right of possession under an alleged location, the first three of these must be proved by evidence outside of the certificate. The certificate when recorded is evidence of the date of the location, the description of the premises, and of the compliance with the statutory requirements of making and recording the same.

Herbert v. King, 1, 475 (1872). In ejectment for a mining claim, plaintiff's evidence showing that his right to the ground was forfeited, and the ground located by third parties, a non-

suit was properly entered though defendants were shown to be in possession. It is necessary that plaintiff shows either title in himself or a right to immediate possession.

Renshaw v. Switzer, 6, 464 (1887). In ejectment for a mining claim, defendant is not entitled to a nonsuit on the ground that plaintiff did not show that he had done the necessary work to represent the claim. Having shown a valid location, plaintiff's title was good, and he was entitled to a possession unless the defendant defeated such title. The failure to do the necessary work would work a forfeiture, but this must be pleaded and proved by the defendant.

Abbott v. Primeaux, 16, 361 (1882). Plaintiff brought ejectment for a town lot, claiming title under a patent issued for a mining claim. A nonsuit was granted on the ground that the land in dispute was the surface of the mining claim, and it was not shown that plaintiff required or had any use for the same in working his claim. *Held*, error. The patent made out a *prima facie* case. The validity of the above objection depended upon the nature of defendant's claim of title.

Wills v. Blain, 4, 378 (1889). In an action to recover possession of a mining claim, where the only contention is as to the performance of the required annual work, it is sufficient to instruct the jury that plaintiff must prove some title and right to possession of the claim by a preponderance of the evidence, and that such right must be better than that of defendant.

Duffy v. Mix, 24, 265 (1893). The rights of one who has located a mining claim under the United States statutes are possessory merely, and do not confer title to real estate. "This possessory right is declared by the statutes and decisions of some of the States to be real estate title, and as such passes to the heir, and is subject to seizure and sale. In this State we have no statute declaring such possessory rights or rights of possession to a mining claim to be real estate title."¹ An action to recover such possessory right may therefore be maintained in a justice's court under Hill's Code, secs. 2175-2183.

It seems that ejectment will not lie for a mining claim in Oregon.

III. CONVEYANCE OF MINING CLAIMS BEFORE PATENT. STATUTE OF FRAUDS.

As was stated above, mining claims are property, and like other property they may be alienated in the various ways in which property may be alienated. The possessory title passes to the grantee, not by operation of law, but by virtue of the conveyance. The view originally taken in California was that as this property rested in possession, it might be conveyed by parol and delivery of possession. A written conveyance was unnecessary where

¹ See, however, Hill's Code 1892, secs. 3830, 3835.

such actual transfer of possession took place, though of course it was equally effectual. The possessory title being a right or license to use the land, and not an interest in the land, was not within the Statute of Frauds. Thus a locator on leaving his claim might designate a successor, who, upon taking possession, acquired a valid title to the claim. The designation acted as a gift (see page 295). Where, however, the grantor was not in actual possession, and did not deliver actual possession to the grantee, a written conveyance was necessary. The rule might, however, be negatived by a legislative provision requiring a written conveyance of mining claims. This was done in California by the act of 1860, which provides for the conveyance of claims by bills of sale or instruments in writing not under seal. This act excluded parol conveyances. Even in the absence of statutes, a written conveyance might be required by usage or custom, in which case parol conveyance would be insufficient.

This view of the nature of the possessory title and the manner of its transfer no longer prevails in California or elsewhere, and though it has the sanction of the *dictum* of Lamar, J., in *Mining Co. v. Taylor*, *infra*, and of the case of *Omar v. Soper*, 11 Colo. 380, it is believed to be no longer the law, and a parol conveyance is now insufficient to pass the title to a mining claim. In Montana and Nevada, and recently in California, a mining claim is held to be real estate, and as such to be within the provisions of the Statute of Frauds. This, it seems, is likewise the view taken in Utah.

The record book of a mining district is not evidence of a transfer, but if it has been put in evidence without objection, it makes out a *prima facie* case, and puts the defendant upon proof that plaintiff's title was divested.

The location of a claim by one acting as agent for an absent locator is not a conveyance, and is not within the Statute of Frauds, nor is an agreement of mining partnership.

The ordinary form of conveyance is sufficient and proper for the transfer of mining claims, when in writing. If the statute requires a bill of sale, no prescribed form of language is requisite. The mining deed differs from the ordinary deed only in the description of the property and its appurtenances. If a mining claim has a known descriptive name, it may be described in a deed by that name, and parol evidence is admissible to explain

and locate it. Even if it is known by different names, either may be used, if the claim can be ascertained thereby. If in addition to the name there is a special description, no wider significance can be given to the name than is warranted by the description. Where the same claim has been twice located under different names, a conveyance by either will carry all the grantor's title under both locations, even if the name used was that of an invalid location.

A ditch and water rights belonging to the owner of a mining claim, used in the working of the claim and necessary thereto, are appurtenances thereof. Upon a purchaser of the claim, who asserts that they pass to him as appurtenances, lies the burden of proving that they are such. As between a buyer and seller of a mining claim the law of fixtures is applied as to other real estate.¹

An agreement to convey a mining claim does not pass the title so as to enable the equitable grantee to maintain ejectment. So when the locators of claims agree in writing to form a corporation, and convey their interests to it, until the conveyance is made no title vests in the corporation.

United States. *Mining Co. v. Taylor*, 100, 37 (1879). Lamar, J.: "A written conveyance is not necessary to the transfer of a mining claim" (not necessary to decision).

Little Pittsburgh Con. M. Co. v. Mining Co., 17 Fed. 57 (1883), C. C. D. Colo. After a mining claim has been properly located, the owner may sell any part without prejudice to his right to hold the remainder. He may dispose of it by gift or grant in any way that seems proper to him, and the mere fact that a part of it, though containing the discovery shaft, is transferred to another will not defeat the right of the locator to other portions which were not so sold, disposed of, or surrendered.

Manuel v. Wulff, 152, 505 (1894). The claim passes to the grantee not by operation of law, but by virtue of the conveyance. See this case *ante*, page 323.

Arizona. *Rush v. French*, 1, 99 (1874). When a location is made for an absent locator, whether with or without his authority or knowledge, whatever rights are given to him by such location vest in him at once, and can only be divested by his own acts or omission or by operation of law. It is not necessary that authority should exist or ratification take place before other valid claims intervene. The Statute of Frauds has no application to this case. The writing required by the statute "is to be signed by the party creating the estate, or by some one having written authority to do so. The party who locates a mine obtains an estate therein by such an act, but it is not he who creates that estate."

¹ See *ante*, page 128 n.

Jackson v. Feather River Co., 14, 18 (1859). "Indeed, California. *we are unable to see why, upon questions as to the occupancy of mineral land, a transfer of the right of the occupant to the possession, which is about all his claim to it, is not good for all purposes, to the vendee taking possession, when evinced by agreement, as by a deed."

Hart v. Plum, 14, 148 (1859). A flume built by a mining company along the bank of a river leading to the mining claims of the company, and which was appurtenant to and essential to the working of these mines, is not exempt from taxation under the statute exempting mining claims. "It is not affixed to the claim so as to become a part of it. It is rather to be regarded as machinery, or as apparatus useful in mining."

Attwood v. Fricot, 17, 37 (1860). Plaintiff having offered in evidence the book in which mining claims were recorded, in accordance with the mining rules of the district, to show title in the original locator, then offered the entry in that book of the transfer to plaintiff's lessor. *Held*, that the book was admissible to show compliance with the rules, but not to show the fact of transfer.

Gore v. McBrayer, 18, 582 (1861). G., M., and nine others verbally agreed to prospect for quartz, and to be equally interested in the claims taken up. M. discovered a lead and located it by putting up a written notice with his own, G.'s and the others' names on it. This process was the usual mode recognized among miners to indicate the taking up of a claim of this sort, — as, in fact, an appropriation or proof of appropriation of the claim. G. thus acquired a right to his share of the claim, which right could not be divested by M.'s taking down the notice on the following day and putting up another which did not contain G.'s name. The Statute of Frauds has no application to this class of cases. It is not a mode of vesting or transferring title from the owners of the fee or the holder of that title, but a mere mode of showing that the locator has availed himself of the government's concession of the privilege of occupying and using the ground.

Table Mountain Tunnel Co. v. Stranahan, 20, 198 (1862). A written conveyance is not necessary to the transfer of a mining claim. The right to a claim acquired by appropriation rests upon possession only; and rights of this character, not amounting to an interest in the land, are not within the Statute of Frauds, and no conveyance other than a transfer of possession is necessary to pass them.

Thus, where the locators of a claim became incorporated, and placed the corporation in possession as their successor in interest, with the evident intention that whatever rights they had should pass to the company: *Held*, that the title passed.

Gatewood v. McLaughlin, 23, 173 (1863). The right to a mining claim upon the public lands rests upon possession merely; and a sale by parol by one in possession and having the title, accompanied by a transfer of possession, transfers the title. A subsequent vendee by deed has no title as against the prior vendee by parol.

Draper v. Douglass, 23, 347 (1863). Instruments conveying mining claims need not be under seal.

Patterson v. Keystone M. Co., 23, 575 (1863). A *bona fide* parol sale of a mining claim, accompanied by delivery of possession, is valid as against a subsequent sale by the same grantor by deed duly acknowledged.

The possession of one claiming under a parol sale or unrecorded bill of sale, in order to constitute notice to a subsequent purchaser, need not be evinced by an actual enclosure or anything equivalent thereto.

Richardson v. McNulty, 24, 339 (1864). An abandonment can only take place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess it for himself, and regardless of what may become of it in the future.

If the possession of the occupant be continued in another by the expression of a wish or desire of the occupant to that other that he succeed to the possession, and he thereupon takes possession, a gift is the result; there is no abandonment. A mere wish or desire of the occupant when he leaves possession that another may succeed him, without being communicated to that other person and assented to by him, and accompanied by a transfer of possession, does not amount to a gift.

Copper Hill Co. v. Spencer, 25, 18 (1864). The rule allowing mining claims to be transferred by a verbal sale and delivery of possession applies only to cases where the grantor is in actual possession and delivers actual possession to the grantee; it does not extend to cases where at the time of the sale the claim is in the adverse possession of third parties. In such cases a written conveyance is necessary to pass title.

St. John v. Kidd, 26, 263 (1864). Mining claims may be conveyed by bills of sale or instruments in writing not under seal. Statutes of 1860, p. 175. A book purporting to be for the record and transfer of mining claims, and shown to have been authorized by the mining customs and rules in force in the district, having been offered in evidence to show title, and not having been objected to, is *prima facie* evidence of the title which its entries show. It is secondary evidence of the appropriation of the ground and its conveyance, and not being objected to on the ground that it was secondary, of itself made out the plaintiff's case under the mining laws of the district, and put the defendant's to the proof of the plaintiff's forfeiture or abandonment under the same.

Goller v. Fett, 30, 481 (1866). A verbal sale of a mining claim, even if accompanied with delivery of possession, does not pass the legal title. The provision in the act of 1860, p. 175, that conveyances of mining claims may be evidenced by bills of sale or instruments in writing not under seal is mandatory and excludes parol conveyances.

King v. Randlett, 33, 318 (1867). Where one acquired his interest in a mining claim by purchase, evidenced by deed or bill of sale, he was bound, for the purpose of showing title in himself, to produce the deed or bill of sale or prove its loss, for the purpose of laying the foundation for the introduction of secondary evidence as to its contents.

In California, after the passage of the act of April 13, 1860 (Stats.

1860, p. 175), a deed duly acknowledged, or a bill of sale accompanied by delivery of possession, was held necessary to pass the title of a mining claim to a purchaser. Prior to said act a verbal sale, accompanied by delivery of possession, had been held sufficient.

Hardenbergh v. Bacon, 33, 356 (1867). In Nevada, mining claims, being treated as real estate, are within the Statute of Frauds.

Blodgett v. Potosi Co., 34, 227 (1867). In the absence of statute, usage or custom requiring it, no deed or writing is necessary for the conveyance of mining claims.

Felger v. Coward, 35, 650 (1868). *Goller v. Fett* followed. Where the owner of a mining claim contracts with another by written agreement to convey by sufficient deed his interest in the claim upon payment of a certain price, the latter cannot maintain ejectment thereon. His remedy is for specific performance. No title passed by the above agreement.

Meyers v. Farquharson, 46, 191 (1873). No precise form of words is necessary to convey a mining claim by bill of sale. If it be clear from the language of the instrument that the maker intended to pass thereby the title to the property, the law will, if possible, so construe the words used as to effectuate that intent.

"I do hereby give him a clear bill of sale," after reciting a verbal gift and delivery of possession, is effectual. The owner of a mining claim may make a gift of the same by bill of sale, which is good evidence of title.

Quirk v. Falk, 47, 453 (1874). If a mining company owns a claim and buys a water ditch and the water rights thereto pertaining, this alone does not constitute the ditch and water rights appurtenances of the mining claim. One who buys a mining claim and its appurtenances, and asserts that a ditch and its water passes by the conveyance, has cast upon him the burden of proving that they are appurtenances, i. e. were used for and were essential to the working of the claim.

San Felipe M. Co. v. Belshaw, 49, 655 (1875). If several persons who own mining ground agree in writing that they will incorporate, and that as soon as the corporation is formed each one will convey to it his interest in the ground, receiving in consideration stock of the corporation, and the corporation is formed, but the conveyances are not executed, the agreement is not sufficient to divest the title of the parties so as to enable the corporation to recover the ground in ejectment.

Melton v. Lambard, 51, 258 (1876). A gold mine is real estate, and an interest therein other than an estate at will or for a term not exceeding one year can be transferred only by operation of law, or by an instrument in writing subscribed by the party disposing of the same, or his agent authorized by writing.

Ginocchio v. Amador Canal & M. Co., 67, 493 (1885). A canal company and a mining company entered into a contract by which the former were to furnish water to the latter, who were to build a ditch which was to be paid for in water. Held, the ditch and water supply were not appurtenant to the mining company's mill or mine, and they might assign the contract with the canal company without transferring the mining property. "The water supply of a mill will ordinarily

pass with a conveyance of the mill, but in order to do so it must belong to the owner of the mill."

Garthe v. Hart, 73, 541 (1887). The transfer of a mining claim must be in writing under sect. 1691 Civil Code.

McShane v. Carter, 80, 310 (1889). The act of 1880 made it unlawful for the directors of any mining corporations to sell mining ground thereof without the consent of the holders of two-thirds of the capital stock. The term "mining ground" includes whatever realty is incident or appurtenant to the mineralized ground worked as a mine, whatever would pass by a conveyance of the mine itself as an appurtenance thereto. A ditch, by means of which the mine was operated, and which was necessary to the use and operation thereof, is an appurtenance.

A conveyance without consent, as above required, passed no title.

Carter v. Bacigalupi, 83, 187 (1890). If a mining claim has a known descriptive name, it may be described in a deed by that name, and parol evidence is admissible to explain and locate it.

Moore v. Hamerstag, 109, 122 (1895). A mining claim is real estate, and under the Statute of Frauds can only be transferred by operation of law or an instrument in writing.

The location of a mining claim may be made in the name of another than the actual locator; and when so made, the person in whose name it is made becomes vested with the legal title to the claim; and where at the time there was no fiduciary relation between them, and it was not made under any prior agreement to hold the claim in trust for the actual locator, a subsequent parol promise to so hold it is void.

Murley v. Ennis, 2, 300 (1874). The right of possession Colorado. during the work of development is perhaps such an interest in land as cannot be disposed of without a writing; but it may be lost by abandonment, by a desertion of the premises with an intention not to resume work upon them. So if without writing the locator yield up the possession to another, the right which was before in him passes to his successors in possession; or rather the right of the first occupant is gone by abandonment, and by virtue of his occupancy a new right has arisen in him who succeeds. In this way the first occupant may admit into possession with him another under an agreement that the labor of development shall be performed for their joint benefit, and the right acquired by development inures to them jointly. So also of the case where the first occupant agrees for a consideration to proceed with development for himself and another jointly. The undertaking amounts to an abandonment of an interest by himself, and an occupancy by him as agent for his co-adventurer.

Lebanon M. Co. of N. Y. v. Consolidated Republican Mining Co., 6, 371 (1882). The same lode may have different names by which it is known, and a conveyance of it under either name, if otherwise regular, so that it can be ascertained what is intended, is sufficient to pass title.

Omar v. Soper, 11, 380 (1888). A written conveyance is not necessary to the transfer of a mining claim. Where two men discovered a lode, posted a notice, and began developing it, but before location was completed one transferred his interest to the other for a valuable consideration, and the transfer was accomplished by erasing one name

from the notice, the other remaining in full possession and continuing the development, this was not an abandonment. The transfer, though irregular, was as against a subsequent locator effectual.

Roseville Alta M. Co. v. Iowa Gulch M. Co., 15, 29 (1890). A mining claim is real estate, and fixtures attaching thereto become a part of it. This was held of an engine and boiler, of which the former was bolted to timbers sunk in the earth, and the latter was set on rock-work and had the ordinary connections with the engine. These were essential to the enjoyment of the benefits of the claim and the development of the mine.

Suessenbach v. First Nat. Bank, 5, 477 (1889). Mining claims are property, and may be conveyed as such on authority of *Forbes v. Gracey*, 94 U. S. 762.

Hirbour v. Reeding, 3, 15 (1877). A., B., and C. entered into a verbal contract of partnership for the purpose of locating and developing quartz lodes in Montana, they to have equal interests. The G. S. lode was discovered by them, but recorded by B. and C. in their names. All three worked upon and developed the ground. Afterward D. located a part of the same ground under the name of D. lode, but the conflict was settled by a conveyance by D. to B. and C. The contract between A., B., and C. being a partnership agreement for the purpose of dealing in land was not within the Statute of Frauds. A. was entitled to an interest in the ground which he could enforce, and which was not impaired by the conveyance by D. to B. and C.

Southmayd v. Southmayd, 4, 100 (1881). A mining partnership existed under a verbal agreement that one partner should control the interest of the other and receive all the proceeds until he was paid the purchase price of the interest of the other. There was constructive possession under this agreement. *Held*, though no money was paid down by the other party, there was such a part performance as to take the contract out of the Statute of Frauds, and specific performance would be enforced.

Hopkins v. Noyes, 4, 550 (1883). The possessory title to a mining claim is real estate, and ought to be conveyed by deed.

Shreve v. Copper Bell M. Co., 11, 309 (1891). Where, after notices of location of L. and E. claims were filed, the owners of E. moved the stakes at one end so as to conflict with L. claim, and then conveyed by separate deeds their interest in the E. claim as described in the certificate of location, they were estopped from maintaining under a subsequent purchase of the L. claim that their deeds conveyed no part of the latter.

It is customary and proper for locators, when by exploration they have ascertained the true course of their vein, to change their boundaries, and having done so, and abandoned a portion of the original location to the public, it cannot be said to be their intention in conveying the claim to sell, or the intention of the other party to buy, the original location.

Brandow v. Pocotillo S. Min. Co., 6, 169 (1870). Where the words "Pocotillo Mine" were used in a mortgage to designate certain mining ground therein specially described, it could not be set up on foreclosure that a larger tract was intended which was, in fact, known as the "Pocotillo Mine."

Phillpotts v. Blasdel, 8, 61 (1872). One who has located a mining claim may relocate by a different name, and if he then conveys by the latter name, the existence of the former location will not invalidate the conveyance. It seems that this is true even where the relocation was made under the impression that it was a location of an independent lode.

One and the same lode may have two names, by which it is known indifferently, and if it becomes better known under a name derived from a second and invalid location, it may be conveyed by that name, the point to be ascertained being whether the lode in question was the lode meant.

Weill v. Lucerne M. Co., 11, 200 (1876). Where a party conveys all his right, title, and interest in and to certain mining ground, described as a set of claims known as the L. Co. claims, afterwards particularly described, and it appears that his interest was derived from different locations of the same lode, the conveyance necessarily passes his interest under both locations, and it is immaterial that he designated it by the names used in the second location.

Zeckendorf v. Hutchison, 1, 476 (1871). When a discoverer conveys a claim to a third party before he has completed his location, the purchaser is bound to do the acts required to complete the location within the time to which his grantor was limited. The performance of these acts must be stated in a bill for an injunction to restrain a trespass; they will not be presumed.

Houtz v. Gisborn, 1, 173 (1874). Mining claims by a law of the Territory are real property and pass by deed, although the legal title is in the government.

CHAPTER XIV.

THE PATENT.¹

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| <ul style="list-style-type: none"> I. Obtaining the Patent. A. Expenditure. B. Survey. C. The Application Papers. <ul style="list-style-type: none"> (a.) The Application. (b.) Proofs which must accompany the Application. (c.) Posting and Publication. D. Entry. | <ul style="list-style-type: none"> E. Affidavits and Proofs. F. Action by the Land Office and Issue of Patent. G. Hearings as to Character of Land. H. Adverse Claim and Action thereon. I. Effect of the Patent. J. Vacation of Patent. |
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I. OBTAINING THE PATENT.¹

THE possessory right obtained by location is, as has been explained, only an equitable title to the claim, the legal title remaining in the United States. This legal title may be purchased by the owner of the possessory right. The method of obtaining it is provided by Rev. Stats. 2325, as follows: ²—

“A patent for any land claimed and located for valuable deposits, may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly

¹ This chapter only treats the subject in its general aspect; the reader should also consult the different sub-titles of the next chapter.

² This is applicable to placer patents as well as to lodes. *N. Pac. Ry. Co. v. Cannon*, 54 Fed. 252.

posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

It is thus seen that the qualifications of the applicant are that he must be a person, association, or corporation authorized by the act of Congress to locate a claim; the claim must have been regularly and lawfully located, the possessory title kept alive in the manner required by the Revised Statutes, and the applicant or those in his chain of title must have put upon the claim, work or improvements of the value of \$500. These requirements have, with the exception of the last, been sufficiently treated in the foregoing pages.

A. *Expenditure.*

Rev. Stats. 2325 provides that "the claimant, at the time of filing this application, or at any time thereafter within the sixty

days of publication, shall file with the register a certificate of the United States surveyor-general, that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors." This provision is not in lieu of the requirement of Rev. Stats. 2324 as to the performance of annual work, although that may be estimated in this expenditure. Proof of that performance must be made as a part of the "compliance with the terms of this chapter." But in addition the surveyor-general's certificate must be obtained.¹

The expenditure of \$500 must be made upon or for the claim for which application is made. If the claim consist of several locations, it is not necessary that \$500 worth of improvement be put on each location.² The improvements are of the same general nature as the annual work. They must be used in connection with, and must be essential to, the development of the claim. They may be outside of the claim, if used in connection with or made for the purpose of developing it. When the expenditure has been made on several claims, it cannot be counted for the benefit of one only, and the surveyor-general's certificate should show what part is exclusively credited to the claim for which patent is asked. When a series of *contiguous* claims are being developed by one general system, work done on one claim may be credited to all, if sufficient in amount.

The expenditure must be made by the applicant or his grantors, and consequently work done upon an original location cannot be counted in an application based on a relocation. Where, however, there is an amended location by which new ground is added, there need be no work done upon this, for the claim is an entirety, and if done on any part of the claim the expenditure is good.

Expenditure is unnecessary on a mill site connected with a lode, expenditure on the lode being sufficient to hold both. Work done in exploring for lodes may be included in the expenditure on an application for the ground as placer.

Where the applicant bases his right on the provisions of Rev. Stats. 2332, expenditure is unnecessary. It is only necessary to show that he worked the claim in accordance with the requirements of the local law.

¹ See circular Dec. 14, 1885, 4 L. D. 374.

² 4 L. D. 374.

United States. *United States v. Iron Silver Min. Co.*, 128, 673 (1888), affirming 24 Fed. 568 (1885). An applicant for a placer patent proved that he had done \$500 worth of work. Previous to his entering the land as a placer claim he had dug several prospect holes for the purpose of discovering veins or lodes, but without success. The expense of this work was included in the amount alleged to have been done on the placer grounds; and it was contended that no work done in an exploration for veins or lodes ought to count as work done on a placer claim. But the court held otherwise, saying that work done for the purpose of discovering mineral, whatever the particular form or character of the deposit which is the object of search, is within the spirit of the statute.

LAND OFFICE DECISIONS.

The law does not require an expenditure of \$500 upon each location embraced in an application for a patent for a placer claim composed of several contiguous locations. But where there are several distinct and separate tracts embraced in one application, there must be an expenditure of \$500 on each tract. *Copp*, 145 (1874). *Good Return M. Co.*, 4 L. D. 221 (1885).

Where a part of the ground embraced in the entry is entered by virtue of an assignment to the applicant by an adverse claimant, who has been successful in the courts, the applicant as to that portion of his claim stands in the place of his assignor, and must show \$500 expenditure thereon. *Jackson M. Co.*, 3 L. D. 149 (1884).

Several owners of divided or undivided interests in placer mining ground may unite as an unincorporated association in an application for a patent. It will be sufficient if they have jointly expended \$500 thereon. *Copp*, 180 (1875).

An expenditure of more than \$1,500 by the owners of an adjoining mine on the portion of a tunnel running through the premises embraced in an application for patent, under an agreement that the applicants were to have an interest in such tunnel, is considered an expenditure upon the claim applied for. *Union Co.'s Mine*, *Copp*, 218 (1877).

The construction of a tunnel by the owners of a claim through the ground of an adjoining claim, without any agreement with the owners of the latter, cannot be treated as expenditure on the latter. *Head-light Lode*, *Copp*, 259 (1879).

"Any building, machinery, roadway, or other improvements, used in connection with and essential to the practical development of the surveyed claim will enter into and form a part of the expenditures for improvements, to which you are required to certify. Necessarily, however, improvements of the character indicated must be associated with actual excavations, such as cuts, tunnels, shafts, etc., so as to clearly show that they are intended for use in connection with the claims under consideration." *Copp*, 298 (1880).

Labor performed or improvements made by an original locator cannot be claimed as part of the expenditures necessary to entitle a relocater to patent. *Copp*, 300 (1881); *id.* 161 (1875).

The expenditure of \$500 is not required where an applicant bases his

right to patent for a placer on the provisions of Rev. Stats. 2332, relating to the Statute of Limitations. Under that section it is only necessary that claimant should have worked his claim in accordance with the requirements of local laws. *J. P. Sears*, Copp, 312 (1881).

Where a special agent reports non-compliance with the mining law in the matter of expenditures, notice should be given the mining claimants that a hearing will be had, and the special agent should be directed to produce witnesses to sustain his report. *F. L. Bush*, 2 L. D. 788 (1884).

The allowance of an entry is erroneous where the applicants did not at the time of application, or within the period of publication, file the certificate of the surveyor-general showing the expenditure of \$500 upon the claim. *Little Pet Lode*, 4 L. D. 17 (1885).

Expenditure required by law may be made outside the claim if upon roadways, tunnels, ditches, or other improvements, used or to be used for or in connection with the development of the mine. The certificate of the surveyor-general conforms substantially to the requirements of the law when it includes an open cut, a trail, and a wagon road, not entirely on the claim, and states that the cut was made in the rock to facilitate the extraction of ore, and that the trail and road were built to carry the ores to the applicant's smelter, and that they were not included in any improvements on any other claim. *Emily Lode*, 6 L. D. 220 (1887).

Where expenditure is made upon an improvement for the development of a group of claims, the full amount cannot be credited to one of the claims. *Alice Edith Lode*, 6 L. D. 711 (1888).

Work done on a ditch outside of a placer claim, and prior to the location thereof, cannot be accepted in proof of the required expenditure where it is apparent that such ditch was not made for the purpose of developing the claim. To allow claims upon which, as in this case, no work whatever has been done, and which are, and for an indefinite time may continue to be wholly unused for mining purposes, to be tacked on from time to time to improvements made long before their location, would open the door and let in the evil which the law was designed to remedy. This claim embraces all the land between "Texas Placer" and Fall River, and extends 250 feet beyond said river; no work had been done upon it, and it does not appear that mineral has been discovered on it. These facts clearly indicate that the claim was not located for placer mining thereon, but with a view to the ownership and control of the banks of the river which runs through the entire length of the claim parallel with and about 250 feet from its southern boundary. *Trickey Placer*, 7 L. D. 52 (1888).

In order that a ditch built across a claim may be considered as an improvement for purposes of application for patent, it must be shown that it was built for the purpose of developing the particular claim applied for. *John Downs*, 7 L. D. 71 (1888).

Where the application is made upon an amended location, it is not necessary that any improvements be made upon the part added by the amended location. The claim as amended is an entirety, and it is not necessary that the improvements be upon any particular part thereof. *Lincoln Placer*, 7 L. D. 81 (1888).

The cost of a survey, preliminary to the location of a ditch for the

development of a claim, will not be credited on the required statutory expenditure where the ditch has not been dug. *Stork & Heron Placer*, 7 L. D. 359 (1888).

The final decision under judicial proceedings that the claimant is not entitled to any credit for work done on the claim, renders it necessary that the supplementary evidence should clearly show that the value of the improvements, or labor done upon or for the development of the claim, since the date of said proceedings, is not less than \$500. *James D. Rankin*, 7 L. D. 411 (1888).

The expenditure of \$500 upon a mill site is not a condition precedent to obtaining a patent therefor, when the applicant is also the proprietor of a lode, and the mill site is located in connection therewith. In such case it is only required that the mill site shall be used or occupied for mining or milling purposes. *Alta Mill Site*, 8 L. D. 195 (1889); *Copp*, 182 (1874).

Non-compliance with paragraph 5, circular of Dec. 14, 1885 (4 L. D. 374), may be waived if the proof is substantially in accordance with prior regulations. If such proof does not, in some form, show the requisite work or expenditure the discrepancy may be supplied by supplemental affidavit. 8 L. D. 516 (1889).

The applicant having located the I. lode, the W. lode was subsequently located crossing it and embracing the discovery shaft which constituted all the improvements on the I. lode. Application for patent for W. lode was made, and under agreement no adverse claim was filed, but on issue of patent, the patentee conveyed the conflicting portions to the owner of I. lode. The latter having made application for a patent, the improvements upon the excluded portions will not, under Rev. Stats. 2325, support the entry. *Independence Lode*, 9 L. D. 571 (1889).

If expenditures and improvements are made for the benefit of several claims, the surveyor-general's certificate should show what part of such expenditures is exclusively credited to the claim for which patent is asked. *Nil Desperandum Placer*, 10 L. D. 198 (1890).

The proof of expenditure should show that the improvements have been made for the purpose of developing the particular claim for which application is made. *Andromeda Lode*, 13 L. D. 146 (1891).

The fact that a part of the work required by law to be done on a placer claim is performed prior to the location of the claim, and while it is held as agricultural land, does not call for the cancellation of the entry where the full amount of work required by law is performed prior to entry, and good faith is apparent and no adverse claim exists. *Clark v. Taylor*, 20 L. D. 455 (1895).

In the case of an application which embraces several lode claims, the proof should show an expenditure of \$500 on each claim, except where it is shown that the improvements are for the common benefit of all the claims. *Sweeney v. N. Pac. R. R. Co.*, 20 L. D. 394 (1895); *Ferguson v. Hanson*, 21 L. D. 336 (1895).

Work done on different portions of a road constructed for the development of several claims, cannot be apportioned as an expenditure upon the different claims and applied to a claim on which no portion of the road is located. *White Cloud C. M. Co.*, 22 L. D. 252 (1896).

The requirement that the surveyor-general's certificate as to expenditure must be filed within the period of publication is absolute. *Milton v. Lamb*, 22 L. D. 339 (1896).

B. *Survey.*

Having qualified himself to apply for a patent, the first step taken by the claimant of a lode claim, or of a placer claim on unsurveyed land, is to have a correct survey made under authority of the surveyor-general of the State or Territory in which the claim lies. To this end he files in the office of the surveyor-general an application for order for survey, which he accompanies with a certified copy of the original record of location.

Upon this an order for survey is issued to the deputy mineral surveyor of the district who makes the survey, and then forwards to the surveyor-general a diagram of the claim, field-notes made by him, and a certificate of the nature and value of the labor and improvements upon the claim. These are, upon examination, endorsed with the approval of the surveyor-general, and remain in his office permanently. From them is made the final plat. Upon this is endorsed the surveyor-general's approval and certificate that \$500 worth of labor has been expended or improvements made on the claim. Two copies of this plat when endorsed, and a transcript of the field-notes, duly certified by the surveyor-general, are delivered to the applicant or his attorney.¹

A survey is unnecessary when application is made for a placer claim on land already surveyed, the application in such case being made to conform to the legal subdivisions. See the instructions in L. O. Regs., pars. 52-57. But a descriptive report may be had of a placer claim, though this is only required where a survey is necessary.

The reader should consult, in general, the rules of the surveyor-general's office.

Colorado. *Wolfley v. Lebanon M. Co. of N. Y.*, 4, 112 (1878). The claimant is required to file in the Land Office a diagram of his vein or lode. Before he prepares this diagram, he should so far develop his lode as to be able to trace its course. If the surveyor does not cover the lode, the patentee may not shift his lines so far as to include it. The error is his mistake, not that of a government officer.

¹ See L. O. Regulations, pars. 45-51. See also cases under Subd. C. (a), *post*.

LAND OFFICE DECISIONS.

Where any material error occurs in the survey of a mining claim so as to mislead parties who may have a right to file adversely, or not to apprise them of the exact boundaries, extent, nature, and location of the claim, the applicant should commence *de novo*, for the patent when issued must conform to and agree with the description as given in the plat and field-notes. Copp, 100 (1878). This applies even after the issue of a patent, which will be required to be surrendered, or proceedings to vacate it will be instituted. *United States v. Rumsey*, 22 L. D. 101 (1896).

Upon unsurveyed land, or where by reason of other *bona fide* claimants a legal subdivision of surveyed land cannot be embraced in the application for a placer claim, a survey should be made in accordance with the circular instructions of the Land Office. Copp, 115 (1878).

Where a placer claim is situated upon surveyed lands and conforms to legal subdivisions, no survey or plat is required. Copp, 124 (1878).

A survey under the mining act does not withdraw the land embraced thereby from sale or subsequent survey, unless followed by an application for patent. Copp, 217 (1877).

The survey required by Rev. Stats. 2325 must be made after location. A survey made prior to the date of location may not receive the approval of the surveyor-general and thus become official. Copp, 230 (1878).

A claim which was described in the location notice so that it could not be subsequently identified, and was surveyed by attaching it to a corner post of a claim which was located without reference to any natural object or monument, will not be acted upon by the Land Department. "All surveys of mineral claims for which patent is sought must be connected with some corner of the public surveys, or with some mineral monument or permanent natural object. The connecting of one survey with another makes the accuracy of the last wholly dependent upon the perfection of the first survey." *Headlight Lode*, Copp, 259 (1879).

"In the first place, a claimant having a mining claim which has been located and recorded according to law, has the right to have it accurately surveyed and platted in accordance with the location, by or under the direction of the surveyor-general; and in order that he may use such survey and plat in the proper prosecution of any right, which he may have or allege, to patent for such claim from the United States, he is entitled to the surveyor-general's approval of the survey, and his usual certificate showing that the same was made in accordance with the law and instructions, and that the plat is correct; provided always, that the complainant pays the expenses of the survey (Rev. Stats. 2325, 2326, and 2334); and no one, in my opinion, has the right to be heard before the surveyor-general, your office or this Department by protest or otherwise, in opposition to the making or the approving of such survey or the granting of such certificate, except the party entitled to the survey. The procuring of an official survey of a

mining claim is, from its very nature, an *ex parte* proceeding, in which the claimant alone is interested. It prejudices the right of no one, and settles or decides nothing as regards the title of the claim. When such a survey is procured, it may be used as evidence by the claimant in proceedings for patent. If there be a previous application for a patent of the same lands, such survey cannot be of any value until such prior application be rejected, because such application would withdraw the lands described from subsequent application. If such prior application be rejected, it would, however, be of value to the party making the claim." *Orient, etc. Tunnel Lodes*, Copp, 281 (1880).

The mineral survey first applied for shall have priority in all its stages in the office of the surveyor-general, including the delivery thereof, over any other survey of the same ground or any portion thereof. *Lizzie Bullock M. Claims*, Copp, 299 (1881).

The surveyor-general may make an assumption, based upon the returns of survey and the deputy's report, that the vein follows a certain direction. If this assumption is objected to, it is his duty to refuse to approve the survey until the course of the vein is actually determined, or admitted by the claimant to lie in a certain direction. The surveyor-general has no right to dictate the form a survey must take, provided the same is within the lines of the location, and this has been properly made. He has a right to require the abandonment of any surface ground lying beyond a line drawn through one extremity of the lode parallel to the end line through the other extremity, and that the extremities of the lode within claimant's ground be fixed by the end lines, not by an end and a side line. The surveyor-general has no jurisdiction in matter of conflicts: he has only to survey claims in accordance with the law and regulations, and within or according to the limits located. Copp, 304 (1881).

Bearings and distances must be given in a survey from the respective survey corners to the location corners, and the same must be shown on the plat. *Philip Dephanger*, 1 L. D. 581 (1882).

An allegation that the claim is not properly bounded by the survey stakes, but includes part of protestant's patented mine, raises an issue on a matter of administration which may be examined through the office of the surveyor-general, and any errors corrected if found. *St. Lawrence M. Co. v. Albion Con. M. Co.*, 4 L. D. 117 (1885).

A single application for patent or the survey of a claim may embrace several contiguous locations. In accordance with statutory requirement, the survey should exhibit the boundaries and conflicts of each location covered by the application. *S. F. Mackie*, 5 L. D. 199 (1886).

The requirements of the statute, that a placer claim upon surveyed land must conform to the legal subdivisions as nearly as practicable, must be construed to mean that such claims must conform to the survey as nearly as reasonably practicable. *Pearsall & Freeman*, 6 L. D. 227 (1887).

The official plat and field notes of survey of a placer claim on surveyed land may be properly required where it is impracticable to accurately designate the land included within such claim. *G. A. Khern*, 6 L. D. 580 (1888).

A mineral entry may be submitted to the Board of Equitable Adjudication where the law has been substantially complied with and no adverse claim exists, and the only defect is an erroneous description in the survey of the connecting line, such error being the result of an erroneous marking of a corner located by public survey, and it being shown that the mineral survey was made in accordance with the location notice and boundary stakes, and embraced the identical land originally located. *Buena Vista Lode*, 6 L. D. 646 (1888).

An amended survey is permissible where, through error of the deputy surveyor, the connecting line, as shown by the original survey, was incorrectly located, but the claim was sufficiently identified by the description given, and good faith fully manifest.

On filing such amended survey, showing the connecting line actually run upon the surface of the ground, the entry may be referred to the Board of Equitable Adjudication. *Veta Grande Lode*, 6 L. D. 718 (1888); *Walter C. Childs*, 10 L. D. 178 (1890).

While an application for patent or for survey of a mining claim consisting of several locations is legal, yet the survey must, in conformity with statutory requirements, distinguish the several locations and exhibit the boundaries of each. *Golden Sun M. Co.*, 6 L. D. 808 (1888).

Surveyors-general must require the applicant for survey to furnish a copy of the original record of location, properly certified, etc., and cause all official surveys to be made in strict conformity to the lines established thereby. A survey made in accordance with the dictation of parties in interest, and not in accordance with the location upon which it is ordered, is a private and not an official survey. This rule is applicable to amended as well as original locations. *Lincoln Placer*, 7 L. D. 81 (1888); *Rose Lode Claims*, 22 L. D. 88 (1896).

A hearing may be allowed for the submission of evidence in explanation of an apparent discrepancy between the survey and the claim, as marked upon the ground and described in the location. *Emma Lode*, 7 L. D. 169 (1888).

An examination of a placer claim and report thereon by a deputy mineral surveyor, at the expense of the applicant for patent, should not be required, where the claim is upon surveyed land and in conformity with legal subdivisions. *R. T. Gerhauser*, 7 L. D. 390 (1888).

An amended survey of a mill site will be required where no connection is shown with a mineral monument or a corner of the public surveys. In requiring such amendment the applicant should be informed that his entry will be cancelled if such requirement is not complied with in a specified period. *Senator Mill Site*, 7 L. D. 475 (1888).

There is no authority for the repayment of money deposited to cover the cost of office work on the survey of a mineral claim, though the money so deposited remains unexpended. In such a case the deposit may be applied on a new survey, if one is desired. *Elijah M. Murphy*, 8 L. D. 102 (1889).

It is not necessary that the survey of the mill site should be connected with a corner of the public surveys, or a mineral monument, if such survey is properly connected with the survey of the lode claimed in connection therewith. *Alta Mill Site*, 8 L. D. 195 (1889).

In the survey of a mineral claim a connecting line run to a section corner on a township line is sufficient, though such township may not be subdivided. *John C. Hauck*, 10 L. D. 391 (1890).

The surface right is an adjunct of the lode claimed, and cannot extend beyond the point where the lode intersects the line of a senior location, and in such case the end lines of the survey will be required to be readjusted. *Plevna Lode*, 11 L. D. 236 (1890).

In the survey of a lode claim that conflicts with a prior valid claim, that is excepted from the application, the applicant's right does not extend beyond an end line passing through the point where the lode intersects the line of the senior location, and a new survey readjusting the end lines will be required. *Cons. M. Co.*, 11 L. D. 250 (1890); *Correction Lode*, 15 L. D. 67 (1892).

The general rule as to the connection of a mining claim with the public surveys is not abrogated by the departmental decision rendered in *Kendall Mt. Placer*, 14 L. D. 105. "It was not the intention of that decision to abrogate the general rule, but to show that in that particular case there was a sufficient compliance with that rule." *Eugene McCarthy*, 14 L. D. 294 (1892).

In case of a mineral entry that is in conflict with a prior pre-emption claim, the land embraced in said entry, which lies beyond the point where the lode intersects the boundary of the pre-emption claim, must be excluded from the survey. *Bi-metallic Min. Co.*, 15 L. D. 309 (1892).

Where an amended survey is required, the applicant should be notified thereof, and that if he fails to comply within a designated period the entry will be cancelled.

It rests within the discretion of the surveyor-general to regulate the amount required as a deposit to cover the expenses of office work on a mineral survey; and it will not be assumed in the absence of any showing that the sum required is unreasonable. *Vanderbilt Lode*, 16 L. D. 105 (1893).

An amended survey and republication of notice will be required where it is found that the land embraced in the application as set forth in the official survey and published notice is incorrectly described. *John K. Castner*, 17 L. D. 565 (1893); *Wheeler v. Smith*, 23 L. D. 395 (1896).

For the purpose of including land held and claimed under a lode location, which was valid when made, the end line of the survey may be established within the boundaries of a patented placer. *Black Diamond Lode*, 22 L. D. 284 (1896).

C. The Application Papers.

The applicant having obtained from the surveyor his plat and field notes, then prepares his notice of application for a patent, in triplicate. The contents of this notice are prescribed by the Land Office Regulations, par. 29. One copy of this notice, together with a copy of the plat, he posts in a conspicuous place on the claim. A second, together with the remaining copy of the plat, is sent to the

Land Office, where, after being attested by the register, it remains posted during the period of publication. To the third copy of the notice is attached an affidavit of two persons that the notice and plat have been duly posted, describing the place and time of posting. The applicant then files his application, which is an affidavit that by virtue of a compliance with the mining rules, regulations, and customs, and the acts of Congress, he has become the owner of the claim which he describes; and a deposition of the facts, showing a lawful location, the derivation of his title therefrom, and a valid subsisting possessory title, or, in the language of the Land Office Regulations, "the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent."

At the same time are filed the abstract of title, the proof of citizenship, and proof of non-abandonment.

A newspaper having been designated by the register, the applicant must obtain and file a contract by the publisher to hold the applicant alone responsible for his charge for advertising and to make no claim against the United States. Thereupon there is inserted for publication in this newspaper for a period of sixty days a copy of the application notice.

These papers constitute the application papers.

(a.) *The Application.*

Applications must be received in the order of their filing without reference to their order in the surveyor's office. When filed they are *prima facie* evidence of the appropriation of the ground described, and no subsequent application for the same premises can be received; but the filing must be reasonably followed by the other essential acts. It does not confer an exclusive right which others are bound to wait upon indefinitely. A second application will be entertained if accompanied by proof of abandonment by the first applicant and of relocation.

The nature of the ground, whether lode or placer, must be stated in the application. L. O. Regs. 63.

Where the claim lies in two districts, the application should be filed in that where the principal workings are, and posting should be done in both districts. Several placer claims or contiguous lode claims may be embraced in one application. Joint owners must join in an application.

As to applications by trustees, see L. O. Regs., par. 94, and as to applications by non-residents through their agents, see the amendment of Jan. 22, 1880, to Rev. Stats. 2325.

United States. St. Louis Smelting & Refining Co. v. Kemp, 104, 636 (1881). Field, J.: "There is no force in the suggestion that a separate patent for each location is necessary to ensure the required expenditure of labor upon it."

"As these provisions (as to annual labor) relate to expenditure before a patent is issued, proof of them will be a matter for consideration when application for the patent is made. It is not perceived in what way this proof can be changed or the requirement affected, whether the application be for a patent for one claim or for several claims held in common. Labor and improvements, within the meaning of the statute, are deemed to have been had upon a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvement may be on ground which originally constituted only one of the locations. . . . It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations."

Tucker v. Masser, 113, 203 (1885). A patent for a placer mining claim composed of distinct locations, some of which were made after 1870, and together embracing over one hundred and sixty acres, is valid.

Lakin v. Dolly, 53 Fed. 333 (1891), C. C. N. D. Cal. Two or more locations on the same lode may be joined in the same application for a patent.

Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597 (1896), C. C. N. D. Cal. It appears that the doctrine of *Smelting Co. v. Kemp*, that several claims may be included in one patent, applies to lode claims.

Freezer v. Sweeney, 8, 508 (1889). There is no law of Montana. the United States or the Territories requiring the owner of a placer claim, when applying for a patent, to designate the particular use or character of his claim. If it is a placer claim he is entitled to all the mineral deposits therein, except such veins and lodes as are described in Rev. Stats. 2320. If the record of the location contain words of description of the use or purpose of the claim, they do not abridge the owner's right. Such a claim was recorded as a "placer mining or stone quarry claim." Upon a subsequent locator's making adverse claim to an application for a patent, the original locator will not be limited to the location of a stone quarry.

LAND OFFICE DECISIONS.

Where several own undivided interests in a mining claim, all must join in an application for patent. But where they own separate and distinct parts, each may apply for his own portion. *Horrid v. Old Missouri*, Copp, 92 (1878).

"Parties are bound by the record which they make, and it has been the uniform rule of this office, at least since 1871, to confine them to the dates fixed by them in their notice and record of location." *Commr. Drummond*, Copp, 123 (1873).

Where a claim lies partly in one land district and partly in another, the application for patent should be filed in that where the principal workings are situated, as shown by the plat and field-notes, and the diagrams and notices should be posted near such workings. A copy of the diagram and notice should be posted in the register's office in each district, and the notice posted where the application is not filed should state where and when it was filed. Copp, 181 (1875).

The act of Jan. 22, 1880, applies to applications pending at that date. Its benefits are not confined to non-residents, but extend to residents who are not within the district at the time of posting and compliance with other statutory requirements. *Topsey Mine*, Copp, 267 (1880).

Applications for patents must be received in the order of application at the Land Office, not in the order of approval of surveys by the surveyor-general. *Big Flat Gravel M. Co. v. Big Flat Gold M. Co.*, 1 L. D. 562 (1882).

An application for patent duly filed in the Land Office should be treated as *prima facie* evidence of an appropriation of the premises described therein, and a subsequent application pending the first is irregular.

Where the claimants under the second application having adversed the first, and having brought suit in support of the adverse claim, prematurely enter the ground in conflict before the suit has been decided, and it is afterward decided in their favor, the question is one solely between the government and the claimants, and the government may waive the irregularity. *Gunnison C. M. Co.*, 2 L. D. 722 (1884).

Where it is evident that an application for a placer claim is, in fact, an attempt to secure a patent for a water right, the application will be rejected. *William A. Chessman*, 2 L. D. 774 (1883).

Owners of contiguous locations need not present separate applications. They may be embraced in one application. (*Smelting Co. v. Kemp*, 104 U. S. 636.) *F. P. Harrison*, 2 L. D. 767 (1884); *Champion M. Co.*, 4 L. D. 362 (1886).

A mere application to make entry, not properly followed up, confers no exclusive rights which others were bound to wait upon indefinitely. Application having been made after survey and publication commenced, it was, before the expiration of sixty days, suspended at the request of the applicants. Another application was subsequently made which covered part of the same ground, as to which all the requirements were complied with and no adverse claim was filed. There was no ground for withholding patent. *Snow Flake Lode*, 4 L. D. 30 (1885).

An application for a placer patent may embrace more than one location of one hundred and sixty acres. *Samuel E. Rogers*, 4 L. D. 284 (1885).

A single application for a patent or the survey of a claim may embrace several contiguous locations. In accordance with statutory require-

ment, the survey should exhibit the boundaries and conflicts of each location covered by the application. *S. F. Mackie*, 5 L. D. 199 (1886).

Proof furnished by a mining company under a patented entry, and of record in the General Land Office, showing due compliance with local requirements in the matter of filing its articles of incorporation, may be accepted as proof of such filing in a subsequent application made by said company. *Alta Mill Site*, 9 L. D. 48 (1889).

An application to make mineral entry duly presented at the local office, but held without action during the absence of the register, operates to reserve the land covered thereby until final action thereon. *J. B. Rice*, 11 L. D. 213 (1890).

A placer application will not be allowed if the evidence does not show as a present fact the placer character of the land involved. *Searle Placer*, 11 L. D. 441 (1890).

An application properly filed and duly followed by publication and posting is *per se* a segregation of the land covered thereby, and when it is sought to relocate it on the ground of abandonment, the fact must be established. *A. J. Gibson*, 21 L. D. 219 (1895).

Entry will not be allowed of a lode claim which appears of record as embracing non-contiguous tracts. *Apple Blossom Placer v. Cora Lee Lode*, 21 L. D. 438 (1895).

(b.) *Proofs which must accompany the Application.*

Of these the first is proof of title. This is ordinarily furnished by the abstract of title, certified as required by L. O. Regs., par. 32. What evidence is sufficient in case of loss of records is provided by par. 33. Where the applicant is the original locator, a copy of the location certificate takes the place of the abstract. If the applicant relies on a title under the Statute of Limitations, as provided by Rev. Stats. 2332, his line of procedure is set out in pars. 69 to 73. Next comes the proof of the performance of annual labor, or, as it is called, of non-abandonment. L. O. Regs. 74, 75. And, finally, the proof of citizenship. L. O. Regs. 76-80, 94.

Where the portion of the claim containing the discovery shaft and improvements is excluded from the application, there must also be furnished satisfactory proof of the existence of mineral in the ground covered by the application.

Likewise in the case of placers where no survey has been made, and consequently there is no certificate of the expenditure of \$500, there must be filed proof of this expenditure, which is done by affidavits of parties familiar with the claim. L. O. Regs., par. 57. There must also be proof of the placer character of the ground. L. O. Regs., par. 63.

United States. *Doe v. Waterloo M. Co.*, 70 Fed. 456 (1895), C. C. Ap., 9th Circ. Citizenship of the stockholders of a corporation need not be proved otherwise than by showing it to be organized under the laws of a State. Its stockholders are conclusively presumed to be citizens of that State.

LAND OFFICE DECISIONS.

Where a placer claim is situated upon surveyed lands and conforms to legal subdivisions, no survey or plat is required, and proof of improvements may consist of affidavits of parties familiar with the claim, who can testify understandingly in regard to the character and amount of improvements. *Copp*, 124 (1873).

Where the name of a party executing a deed differs from his name as found on the location notice, identity of persons may be shown. Copies of conveyances are unnecessary under the rules. A complete abstract only is required. *Kempton Mine*, *Copp*, 154 (1875).

The objection that applicants did not have title at the date of application is insufficient, unless such fact is clearly shown. Contracts for conveyance, made before application, are sufficient, if full title was acquired before patent issued. *Prince of Wales*, *Copp*, 167 (1875).

Where locators are not applicants, it will be presumed they were citizens, unless allegations to the contrary are made before patent issues. The objection comes too late after patent. *Wandering Boy*, *Copp*, 169 (1875).

Where entry of a mining claim is based upon a relocation of an alleged abandoned claim, and no adverse claim is filed as required by statute, proof of such abandonment is not necessary. *Manhattan & San Juan S. M. Co.*, 2 L. D. 698 (1888).

When application is made for a patent for a placer claim embracing several locations, an adverse claimant may prove abandonment of any one of such locations by failure to make annual expenditure upon it or upon a common claim for its benefit, and the possessory right will fail even though the adverse claimant may not show in himself a good adverse title by reason of a like failure.

Compliance "with the terms of this chapter" as a condition of application for patent under Rev. Stats. 2325, requires expenditure or work upon each location sufficient to maintain possession under Rev. Stats. 2324, either by showing the full amount for the pending year, i. e. the year in which application is made; or, if there has been failure, it should be shown that work has been resumed so as to prevent relocation by adverse parties after abandonment. *Good Return M. Co.*, 4 L. D. 221 (1885); *John Kinkaid*, 5 L. D. 25 (1886).

The abstract of title required under the regulations must be brought down to the date of filing the application, or as close thereto as is reasonably practicable. *Daniel Cameron*, 4 L. D. 515 (1886).

In the absence of a clear showing of possessory right, an application for patent must be denied. *Montana Co.*, 6 L. D. 261 (1887).

"If a vein or lode has actually been discovered within the claimed ground, 'evidence must be furnished showing' the place where and when such discovery was made, the general direction of the lode or

vein, and all the material facts in relation thereto, and must be clear and positive and based on actual knowledge of the facts," and "the witnesses' means of information must be clearly set forth." *Silver Jennie Lode*, 7 L. D. 6 (1888).

Non-compliance with paragraph 5, circular of Dec. 14, 1885, may be waived, if the proof is substantially in accordance with prior regulations. If such proof does not in some form show the requisite work or expenditure, the discrepancy may be supplied by supplemental affidavit. *West v. Owen*, 8 L. D. 576 (1889).

Patent will not issue on an application wherein the land upon which are situated the discovery shaft and improvements is expressly excepted therefrom, and the proof fails to show the discovery or existence of mineral on the remainder of the claim as entered, or the requisite expenditure for the benefit thereof. *Antediluvian L. & M. Site*, 8 L. D. 602 (1889); *Spur Lode*, 4 L. D. 160 (1885); *Cayuga Lode*, 5 L. D. 703 (1887); *Lone Dane Lode*, 10 L. D. 53 (1890).

The instructions of July 6, 1883 (2 L. D. 725), require proof of citizenship from the beneficiaries where the applicant is a trustee. *Capricorn Placer*, 10 L. D. 641 (1890).

Under Rev. Stats. 2321, the citizenship of a corporation may be proved either by a certified copy of its charter, or by a certificate of incorporation. *Silver King M. Co.*, 20 L. D. 116 (1895).

The Land Department has no jurisdiction to inquire into the power of a corporation to take or hold mines. *Rose Lode Claims*, 22 L. D. 83 (1896).

An abstract of title is insufficient where a sheriff's deed is relied on and the decree under which the sheriff's sale was made does not direct the sale of the property in question. *Bradstreet v. Rehm*, 21 L. D. 544 (1896).

(c.) *Posting and Publication.*

The applicant must post one copy of his notice of application and one of the certified plats in some conspicuous place on his claim, usually at the discovery shaft; though it has been held that, when the ground was inaccessible, posting on a conspicuous place near the claim was sufficient. This posting should be done in the presence of two disinterested witnesses, who must make affidavit of the fact, which affidavit is filed with the other application papers. Another copy of the notice of application and of the plat is filed for posting in the Land Office. The applicant must also obtain the contract of the publisher of the designated newspaper, in which there is an agreement to look to the applicant for payment. This is filed, and the register then publishes the notice; which should be a substantial copy of the notice of application. The posting and publication are governed by L. O. Regs., pars. 29, 30, 34-38.

These are necessary in every case, and are the only notice which the applicant is called upon to give. No one is entitled to personal notice of the proceedings. The posting in the Land Office must continue during the entire period. If for any reason the office is closed during that period, the time of such closing must not be computed.

If the application covers several non-contiguous tracts, notice must be posted on each; but one publication is sufficient. As has been said, the published notice should be a substantial copy of the notice of application; at any rate, it must be according to the official field-notes, and the description therein must include the course and length of the line connecting the claim with a corner of the public survey or a mineral monument. If, however, it is not sufficiently explicit, and the posted notice is in due form, the defect may be cured by equitable action, and errors therein are not fatal unless misleading.

The nearest newspaper is the nearest by travelled routes. Considerable discretion is intrusted to the register in the designation of the newspaper, the limits of which are all clearly defined in *Condon v. Mammoth M. Co.*, 15 L. D. 330, and *Bretell v. Swift*, 17 L. D. 558, *post*.

LAND OFFICE DECISIONS.

Where a single patent is sought for several non-contiguous placer claims, in the newspaper publication one notice may include all the tracts, provided it give a sufficiently accurate description of each parcel, to enable other parties in the neighborhood to tell readily what mineral grounds are sought to be patented. But the diagram and notice required by law must be posted on each tract. *Copp*, 78 (1870); *id.* 145 (1874).

No personal notice of application for a patent is required. If the requirements of the law by posting, advertisement, etc., have been strictly observed, the want of actual personal notice to a person whose alleged rights may be injuriously affected is no ground for staying proceedings. *Copp*, 79 (1871).

In estimating the sixty days of publication, the first day of publication is excluded. *Jenny Lind v. Eureka*, *Copp*, 124 (1873).

The notice may be published in a weekly newspaper, but the full period of sixty days must elapse from the first to the last publication. From February 6 to April 3, although covering nine weekly insertions, was insufficient. *Bellwether Lode*, *Copp*, 133 (1874).

An application for patent was rejected, because the notice was published without the register's knowledge, and was not published in a newspaper designated as nearest the claim. *Cascade Lode*, *Copp*, 135 (1874).

The newspaper notice must be published in one newspaper consecutively. *Copp*, 136 (1874).

An error in the description of a claim, making the published notice inconsistent with itself, should put an adverse claimant upon notice, and will not be fatal unless capable of misleading. *Equator Lode*, *Copp*, 178 (1875).

Where the register designates the daily edition of a newspaper for publication of notices under Rev. Stats. 2325, it is not a compliance with the law to change to the weekly edition of the same paper without the register's authority. *Copp*, 189 (1876).

The register has a discretion to designate a newspaper only when there are two or more equidistant, or nearly so, from the claim. In other cases he must designate the newspaper nearest the claim. It is not a compliance with the law to publish the notice in a paper, though designated, six miles from the claim, when one was published two miles therefrom. *Omaha Quartz Lode*, *Copp*, 198 (1876).

The fact that a party bases his right to a patent on the ground that he has held his land for a period which satisfies the Statute of Limitation of his State or Territory, does not avoid the necessity of publishing and posting notices of his application for patent, as in other cases. *Copp*, 259 (1879).

The publication of notice must be in a newspaper nearest the claim by the usual travelled routes, and not by an air-line measurement. The register should designate a reputable newspaper of general circulation. 1 L. D. 108 (1882).

The diagram and notice were posted in an open-shaft house, where no obstruction was shown, and where in the locality it was common for notices to be posted. Such a house was a "conspicuous place" within the requirements of the law. *Louisville Lode Case*, 1 L. D. 548 (1882); *Gowdy v. Kismet G. M. Co.*, 22 L. D. 624 (1896).

The register may exercise his official judgment as to whether publication in the paper nearest the claim will effect the object of it; if not, he may designate another. The newspaper nearest the claim, which was here held to have been properly passed over, was a weekly which had been established but one month before the application, reached a circulation of ninety-five, and suspended publication in less than five months. *Tomay v. Stewart*, 1 L. D. 570 (1882).

It is necessary that the notice of application for patent should be posted in the Land Office during the whole period of sixty days. Where during the period of publication and posting the Land Office is closed for a brief time for removal to another locality, such time should not be computed as a part of the sixty days within which an adverse claim must be filed. *Tilden v. Intervenor M. Co.*, 1 L. D. 572 (1882).

Where the plat and notice were posted within the limits of the claim as located, the posting was sufficient, although on ground which was excluded from the application. *Hughes v. Gilbert*, 2 L. D. 756 (1882).

Where papers are published equidistant, or nearly so, from the claim, the selection for publication of notice rests entirely with the register. But other things being equal, the convenience of the applicant should be consulted. *William A. Arnold*, 2 L. D. 758 (1884).

Publishers must not change figures to words for the purpose of adding to the length of a notice and the charge for its publication. Newspapers which do so cannot be regarded as "reputable," and will not be designated for the publication of mining notices. *Charles W. Steele*, 3 L. D. 115 (1884).

The law requires the posting of notice and plat on the mill site as well as upon the lode portion of a mining claim. In this case, inasmuch as the failure to post was an oversight, and no adverse rights had intervened, and extensive improvements had been made, the requirement was waived. *Bailey v. Grand View M. & S. Co.*, 3 L. D. 386 (1885).

Notice was posted on the claim August 9, was first published August 14, and was posted in the Land Office August 16, and the three forms of notice continued to run to October 16, a period of sixty-one days. This is sufficient. When notice is required to be given by different forms and modes to cover the same continuous period of time, notice by either of the different modes will not run against an adverse claimant until notice has been given by each and every mode and form required. Hence in this case an adverse claim could be filed at any time within sixty days from the date of posting in the office. *Great Western Lode Claim*, 5 L. D. 510 (1887).

Notice of application for patent should give the course and length of a line connecting the claim with a corner of the public surveys, or with a mineral monument, i.e. a monument of some patented claim. *Emperor Wilhelm Lode*, 5 L. D. 685 (1887); *Tennessee Lode*, 7 L. D. 392 (1888); *Broad Axe Lode*, 22 L. D. 244 (1896).

The publication is not sufficient if the notice does not appear in every copy of the paper of each issue for the statutory period. *American Flag Lode*, 6 L. D. 320 (1887).

A mineral entry may be submitted to the Board of Equitable Adjudication, where the only defect in the proof is a misdescription (apparently a typographical error) of one of the lines of the survey, occurring in the published notice of application, and such error appears to be through no fault of the applicant, and can do no injury to the rights of third parties. *Newport Lode*, 6 L. D. 546 (1888).

The place of posting plat and notice of application must be conspicuous. Where these were posted in a tunnel fifty feet beneath the surface, where no one but employees was admitted, and part of the time at a place where not even these could see them, the entry will be held for cancellation and claimants allowed to proceed *de novo*. *Pratt v. Avery*, 7 L. D. 554 (1888).

In the absence of any protest or adverse claim, a mineral entry may be referred to the Board of Equitable Adjudication, where the notice and plat of survey were not posted on the claim owing to its inaccessibility, but were posted in a conspicuous place on an adjoining claim, and it appears that the law has been fully complied with in all other particulars. *Rowena Lode*, 7 L. D. 477 (1888).

A notice of application that fails to connect the claim with the public surveys is insufficient, and the defect cannot be cured by a reference to the Board of Equitable Adjudication in the presence of adverse claimants who had not had legal notice. *Nil Desperandum Placer*, 10 L. D. 198 (1890).

An application for a mineral patent cannot be allowed where the description of the claim in the published notice of application is not in accordance with the official field-notes of survey. *Hoffman v. Venard*, 14 L. D. 45 (1892).

The published notice of application is sufficiently definite in the matter of showing the connection of a mining claim with the public survey where it identifies said claim by connecting the same with a corner of a patented town site, which is also the corner of a patented placer claim, both of which are connected with a United States mineral monument. *Eugene McCarthy*, 14 L. D. 105 (1892).

Publication in a newspaper 125 miles from the claim, when there was a newspaper published 25 miles therefrom, is not a compliance with the law. The applicant will under such circumstances be required to begin anew. *Condon v. Mammoth M. Co.*, 14 L. D. 138 (1892).

Where the published notice of application is not sufficiently explicit in the matter of description, but the posted notice is in due form, the defect may be cured by equitable action in the absence of protest or adverse claim. *Alabama Quartz M.*, 14 L. D. 563 (1892); *Silver King Q. Mine*, 11 L. D. 234 (1890); *Mimbres M. Co.*, 8 L. D. 457 (1889).

"Unquestionably, under this statute, when several newspapers are published in the same town or city, the register may designate whichever in his judgment will best subserve the public interests, and which will give the widest notice to the public that the entrymen are seeking title to a mine. From these views it follows that in this matter the register has some discretion in the designation of the newspaper as to its established character as a newspaper, its stability, and general circulation, and the like. But it is a legal discretion, and in its exercise his act is certainly subject to review and control by your office (General Land Office) and the Department; and where it is shown that he has abused such discretion, your office as well as the Department has the power to set aside his action in order to avoid injustice or unfair discrimination, or an ignoring of the provisions of the law and the rules and regulations of the Department." It is abuse of discretion to pass over a newspaper published in the nearest town to one published in a town more remote. *Condon v. Mammoth M. Co.*, 15 L. D. 380 (1892); *Erie Lode v. Cameron Lode*, 10 L. D. 655 (1890).

The newspaper published nearest the claim in an air line, was published in a town between which and the claim a mountain intervened. The register designated a paper published in a town a little more distant, but communication with which was easier and quicker. This was a proper exercise of discretion. *Bretell v. Swift*, 16 L. D. 178 (1893).

Notice of application must be posted during the period of publication in the local office having jurisdiction. Land having been transferred from G. district to M. district, after filing of application, but before publication, posting in G. office was ineffectual, and a republication was ordered. *Frederick N. Williams*, 17 L. D. 282 (1893).

"The consensus of the rules and decisions seems to be that the notices must be published in an established newspaper with a *bona fide* circulation in the neighborhood of the claim; one that is printed

at the place of its publication, and is, in his best judgment, permanently established and recognized by the community, its advertisers and readers, as being a fixture. I take it that newspapers of this character are to be selected in preference to those predatory journals that are frequently found in new localities, established oftentimes for the sole purpose of getting the Land Office notices, and ready to migrate to the newer settlement when business becomes 'slack' from the local office. In the exercise of this function the register is clothed with a discretion which has been termed 'judicial discretion,' subject, of course, to review. In the lawful exercise of that discretion, he may select a newspaper that he conceives best for the purpose of giving the greatest publicity to the notice, even though it may not be nearest the land; and especially would this be true if the one nearest the land, in his opinion, did not meet the requirements, as to permanency and general circulation, as defined above." *Bretell v. Swift*, 17 L. D. 558 (1893).

The published notice will not be held insufficient on account of failure to give the names of adjoining claims where the numbers of these are given. This is practically as satisfactory for the purposes of notice, unless there is some requirement, statutory or otherwise, to the contrary. *Whitman v. Hallenhoff*, 19 L. D. 245 (1894).

Where due proof of posting is made, and it appears that the protestant had actual notice, an allegation that the posted notice could not be found on the claim does not call for republication. *Byrne v. Slauson*, 20 L. D. 43 (1895).

Placing plat and notice in an open box surrounded and covered by stones at a distance of two hundred feet from the discovery shaft, was held not to be posting in a conspicuous place. *Ferguson v. Hanson*, 21 L. D. 336 (1895).

The notice must state the names of the nearest or adjacent claims and the place of record of the location, giving book and page. *Gowdy v. Kismet G. M. Co.*, 22 L. D. 624 (1896); *Parsons v. Ellis*, 23 L. D. 505 (1896).

D. Entry.

At the expiration of the publication period, the applicant is prepared to make entry. This he does by filing proof of continuous posting and proof of publication, proof of sums paid by him in the prosecution of his application, and his application to purchase. These are the entry or final papers. L. O. Regs., pars. 41, 42. The affidavits must be made by a party owning the mine or a part thereof at the time. If no adverse claim has been filed, the applicant may then pay for the land. The register then issues a final certificate of entry, and the receiver issues his receipt in duplicate, one of which is filed with the papers, and the other is delivered to the applicant. The papers are then forwarded to the General Land Office. L. O. Regs., pars. 42, 93, 94, 95. Upon

the payment of the purchase-money, the applicant's title becomes complete, and when the patent issues, it relates to the date of entry.¹

LAND OFFICE DECISIONS.

When a decision is rendered by which a claim erroneously entered is reduced in size, the purchase-money will be returned to the extent necessary to make the payment meet the requirement of the law. *Copp*, 76 (1870).

The affidavit of continuous posting of plat and notice on the claim must be made by one of the parties owning the mine at the date of entry at the local office. *Kempton Mine*, *Copp*, 154 (1875).

Objections that the publication of notice was not made for ninety days (act of 1866), and that the proof of posting notice and diagram did not show when, where, or for what periods the same were posted, are too late when they come after patent issued. They will not, therefore, be considered upon an application for proceedings to set aside the patent. *Prince of Wales*, *Copp*, 167 (1875).

On application for proceedings to annul a patent, proof of publication which states that notice was published for a period of ninety days, commencing April 15, 1871, is *prima facie* sufficient; that notice and diagram were posted five days after publication was commenced is an irregularity only, and not fatal. *Wandering Boy*, *Copp*, 169 (1875).

An affidavit that deponent had often been upon the land and did not see notice, can have no weight against a positive affidavit that the notice was posted during the entire period of publication. *Olathe Placer*, *Copp*, 287 (1880).

Where a party applies for a patent, and duly posts and publishes a notice, but fails for a long period to pay the purchase-money and make entry at the Land Office, and in the meantime the land is relocated under the provisions of Rev. Stats. 2324, there is nothing to prevent the relocater from making entry thereof except the filing of an adverse claim. If the first locator fails to do this, the second application will be allowed to proceed as though no prior application had been made. *Seaton M. Co. v. Davis*, *Copp*, 296 (1880).

Due compliance with the law and regulations appearing, except in the matter of furnishing proper proof of posting, and there being no reason to question the good faith of the applicant, the entry may be referred to the Board of Equitable Adjudication after new advertisement, posting, and proof thereof. *Connell Lode*, 6 L. D. 717 (1888).

It is the duty of the register to furnish proof of posting in the local office, and in the absence of such proof the applicant may be permitted to furnish satisfactory evidence as to the fact of posting. *Mimbres M. Co.*, 8 L. D. 457 (1889).

It is too late to raise a technical objection to the affidavit of posting, after action on said affidavit and the allowance of the entry.

¹ On this subject see Div. III., this chapter.

The affidavit of posting may be properly made by a claimant whose knowledge of the fact is derived from personal observation at various times of the plat and notice as posted, and from such information with respect thereto as would be accepted by a reasonably cautious man. *Bright v. Elkhorn M. Co.*, 9 L. D. 503 (1889).

The value of testimony as to compliance with the law in the matter of posting is not diminished by the fact that the witness was occasionally absent from the mine. The Department never has required, and it would be most unreasonable for it to require, proof that the notice and plat remained posted each hour of each day of twenty-four hours during the prescribed period of sixty days. *Tangerman v. Aurora Hill M. Co.*, 9 L. D. 538 (1889).

The publication of an application for a patent in a weekly paper requires ten insertions, but where the proof shows that such publication was made under a former practice that recognized nine insertions as sufficient, the entry may be, in the absence of an adverse claim, referred to the Board of Equitable Adjudication for its action. *Oro Placer Claim*, 11 L. D. 457 (1890).

E. Affidavits and Proofs.

All the affidavits required in proceedings for obtaining a patent must be made before the register and receiver, or an officer authorized to administer oaths within the land district where the claims are situated,¹ except that non-resident applicants may make proof of citizenship by oath or affidavit before the clerk of any court of record or any notary public.² Where the applicant is a non-resident, proofs may be made by an authorized agent.³

LAND OFFICE DECISIONS.

Under Rev. Stats. 2335, an officer authorized to administer oaths within the land district may administer the same outside of the district, if within his jurisdiction. *Corning Tunnel v. Slide Lode*, Copp, 208 (1877).

Where there is no adverse claim or protest to an application for a patent, no parties being interested except the applicant and the government, the applicant will be allowed to substitute proper affidavits for defective ones. Copp, 266 (1880).

The affidavits required of an applicant for mineral patent cannot be executed by an agent or attorney if the applicant is a resident of, and, at the date of the application, within, the land district where the claim is situated. This rule has no exceptions. *Rico Lode*, 8 L. D. 223 (1889).

¹ Rev. Stats. 2335.

² Act Jan. 22, 1880, sec. 1.

³ Act April 26, 1882, sec. 2.

F. Action by the Land Office and Issue of Patent.

The papers being all in, they are transmitted by the register to the General Land Office, together with a certificate that the notice was duly posted in the office. L. O. Regs., par. 48.

The entire series of papers is reviewed in the General Land Office. In this examination the Commissioner is not confined to the papers in the case, but may go outside of them, and, if necessary, order a hearing. In the absence of defects, the patent is issued in due course. If fatal defects are discovered, the entry is cancelled; if curable defects are discovered, the applicant is given an opportunity to remedy them. A cancellation places the applicant in the position he occupied before application, in no way affecting his possessory title.

Where the entry embraces land already patented, or covered by a prior pending application, it will be held for cancellation as to the extent of the conflict, and a patent issued for the balance. In practice, at present, all conflicts are marked on the survey, but the exclusion is not made until the papers are passed on at Washington. The previous practice required the exclusion before application, the Land Department refusing consideration to applications conflicting with prior applications; but this is no longer followed.

The patent should contain only terms of conveyance, with recitals showing a compliance with the law and the conditions which it prescribes. There is no authority in the Land Department to insert exceptions or reservations, by which the grantee's estate is abridged or restricted in any other way than it would be without such expression in the patent. It is, however, customary to except ground which conflicts with previous patents.

The patent will issue to the applicant, unless the evidence shows that his title has vested in some one else pending the proceedings, or that he is acting in a fiduciary capacity, in which event it will issue to the grantee, heir, devisee, or *cestui que trust*, as the case may be.

Where patent has issued, it is out of the control of the Department, and cannot be recalled; but if it contain an error, it may be surrendered and cancelled, and a new patent issued.

Deffebach v. Hawke, 115, 392 (1885). "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed."

Consequently a demand by one claiming title under a town site grant, that a patent for the same ground as mineral land should contain a reservation excluding from its operation all buildings and improvements not belonging to the patentee, and all rights necessary or proper to the possession and enjoyment of the same, was properly disregarded by the Land Department.

Talbot v. King, 6, 76 (1886). "There was no law authorizing the Land Department to except the surface ground from the conveyance, or in any other manner to abridge the title of the purchaser; and in so doing it exceeded its authority, and its act to that extent is void and of no effect upon the property conveyed." "A valid location is equivalent to a contract of purchase. The right to occupy and purchase means the right to acquire a full title. The mineral lands are declared open to occupation and purchase, and the patent is the evidence of the title so acquired. The location has therefore the effect of a grant from the government to the locator, and this grant cannot be defeated or abridged by an unauthorized exception contained in the patent, for the patent must always be in accordance with, and the consummation of the grant evidenced by, a valid location."

LAND OFFICE DECISIONS.

Where, pending application for a patent, the claim is sold at sheriff's sale, the patent will be issued and delivered to the purchaser or his grantee, if proper evidence of title is given. *Washington Lode*, Copp, 85 (1872).

It is contrary to the fixed policy of the Department to recall a patent once issued, unless it is shown that an error has been committed in the description of the tract or in the name of the patentee. Copp, 87 (1872).

Where an applicant for patent sells his claim pending application, the patent will be issued to the grantee. If sold before entry, the register's certificate and receipt should be in the grantee's name, and patent will issue accordingly. If after entry, an assignment by endorsement upon the duplicate receipts should be made by the applicant to his grantee, to whom the patent will then issue. Copp, 97 (1873).

The examination of an application for patent under the mining laws should proceed beyond the papers filed in the case, and into those general records of the General Land Office which evidence the final disposition made of the public domain; and if it is found that any part of the premises applied for has been previously disposed of, an express exception thereof should be inserted in the subsequent patent. *Seven Thirty Lode*, Copp, 137 (1874).

It is error to include in a patent, ground which was neither included in the final survey nor in the original application and published

notice. In such case proceedings will be commenced in the name of the United States to set aside the patent. *Prince of Wales, Wandering Boy*, Copp, 163 (1875).

Where the claim has been erroneously described in a patent, a new patent will be issued upon the return to the General Land Office of the patent, and a relinquishment to the United States by the patentee and his grantees of the premises therein described, with a certificate of the recorder of the record of such relinquishment. Copp, 175 (1875).

A foreign corporation purchasing a patent issued to citizens of the United States, takes all the rights and is entitled to all the privileges that would have accrued to the original patentees had they retained their interest in the mine. Copp, 177 (1875).

A conflicting survey already patented cannot, as an adverse claim, delay an application for a patent. The ground in conflict will be excepted from the subsequent patent. *Equator Lode*, Copp, 178 (1875).

Where an application for patent is signed by the executor of a deceased locator, there should be filed a certified copy of the letters testamentary with a copy of the will attached, and where the executor is one of several, evidence that one could legally pass title by deed. Copp, 190 (1876).

A patent will not issue including a placer and lode claim when said claims are not contiguous, and the lode is entirely without the placer location. Copp, 236 (1879).

A second application for land already applied for should not be received by the local officers. Such an application having been filed after the first was rejected by the Commissioner, but before the expiration of the period for appeal, it was dismissed, although the secretary, on appeal, affirmed the Commissioner's ruling. *Chavanne Q. Mine*, Copp, 286 (1880).

The cancellation of a mineral entry for non-compliance with antecedent statutory requirements does not affect the possessory rights of the applicant. These rights remain the same as if no entry had been made. In such a case the applicant is entitled to the return of fees provided for by the act of June 16, 1880, chap. 244. 1 L. D. 527 (1881).

Where entry is made upon a false survey and publication, the proceedings will be cancelled, and the applicant allowed to commence anew, and proceed by a proper publication upon a correct survey. *Gustavus Haglund*, 1 L. D. 593 (1882).

It is not necessary that mineral be discovered in the discovery shaft, if it is discovered within the limit of the claim before adverse rights attach. After entry, where there is no fraud, and in a question between the government and applicants only, if it becomes necessary, in order to support the entry, to find that the applicants had mineral in their discovery shaft, it will be so found in all cases where the evidence is conflicting. *Wright v. Tabor*, 2 L. D. 738 (1884).

A patent upon an application made by the administrator of a deceased owner should issue to the heirs of such deceased owner. *Henry Wood*, 2 L. D. 762 (1884).

An application for patent is an appropriation of the ground embraced therein, and parties who have filed an adverse claim against an application cannot file an application for the same ground or any part of it while the controversy is pending. *Great Eastern M. Co. v. Esmeralda M. Co.*, 2 L. D. 704 (1883).

Where application for patent was made for ground covered by a prior application, and the conflict was shown by the record in the first application, the second application should have been treated as an adverse claim. Although the second applicants did not file an adverse claim, being misled by the error of the register in receiving their application, they will now be allowed thirty days in which to institute suit. *Hall v. Street*, 3 L. D. 40 (1884).

It has been the practice of the Land Office not to inquire as to the status of the original or prior location when the discovery was made within the boundaries thereof, unless an application for patent has been made for such original or prior location. If the owner of the original or prior location neglects to adverse the application for a patent to the junior location, it must be assumed, under that provision of Rev. Stats. 2325, that the claimant of such junior location is entitled to a patent as against the claims of the prior locator. The patent when issued relates to the date of entry to the exclusion of intervening rights. Rev. Stats. 2324 has reference only to title by possession. *F. P. Harrison*, 2 L. D. 767 (1884).

S., the locator and owner of a claim, conveyed the same to C. on 28th September, 1881, with an agreement that S. should apply for patent in his own name. S., to carry out the agreement, applied for patent on Nov. 1, 1881. In 1883 C. conveyed to E. No objection having been made, a patent will issue in the name of S. *A. P. Smith*, 3 L. D. 340 (1885).

Conflicting rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict. In the event that patent should be issued upon said application, and any question should thereafter arise as to the right under such patent to follow any vein or lode, as indicated in Rev. Stats. 2322, it would be a matter for the courts to settle. *N. Y. Hill Co. v. Rocky Bar Co.*, 6 L. D. 318 (1886).

A mineral entry prematurely allowed, pending the disposition of adverse litigation, may be permitted to stand on the withdrawal of the adverse claims, the question then being one solely between the government and the applicant. *Meyer v. Hyman*, 7 L. D. 336 (1888); see s. c. 7 L. D. 83.

There is no authority of law for the insertion in a mineral patent of a clause reserving the rights of a town site. A town site patent is inoperative as to all lands known at the time of the entry to be valuable for mineral, or discovered to be of such character prior to the occupation or improvement of the land for residence or business under the town site laws. "As to the power of the Department to recall a defective patent, there can be no question where a patent has been issued in conformity with the decision of the Department upon which the right to such patent rests, and has been placed in the hands of the local officers for delivery; it has then passed beyond the control

of the grantor, and is subject only to the will of the grantee. This was the character of the patent in the case of *United States v. Schurtz* (102 U. S. 378); but where the patent has not issued in conformity with the judgment of the Department, awarding the right of entry, as in this case, and its acceptance has been refused by the grantee, the Department has the power to recall said patent with the consent of the grantee and issue one in conformity to said judgment." *W. A. Simmons*, 7 L. D. 283 (1888).

Neither the evidence nor the finding thereon should be considered on the final adjudication of another and independent case, where such evidence was not offered at the hearing of the latter case. *Bright v. Elkhorn M. Co.*, 9 L. D. 503 (1889).

The Land Department has authority to order a hearing to determine whether there has been due compliance with the mining law, though the charge is not made until after entry. *Sweeney v. Wilson*, 10 L. D. 157 (1890).

An English corporation conveyed a claim to a citizen of the United States in trust that he might obtain a patent, and he agreed to reconvey upon securing the receiver's receipt. He had no further interest therein. He was held to be merely the agent of the corporation, which, incompetent to secure title by proceedings under the statute, could not accomplish that end by the indirection by means of an agent. *Capricorn Placer*, 10 L. D. 641 (1890).

A mineral entry made during the existence of another entry for the same tract is irregular, but may be allowed to stand on the cancellation of the previous entry.

A decision of the Department holding an entry for cancellation "without prejudice to the claimant's proceeding *de novo* in a regular manner," is in effect only a permit to the claimant to renew his application subject to all adverse rights. *Moss Rose Lode*, 11 L. D. 120 (1890).

That a lode application expressly excludes land in conflict with a prior entry will not operate to except such land from the claim, if, in fact, there is no conflict. *Steamboat Lode*, 13 L. D. 163 (1891).

In case of a patented town site entry of land containing a valuable mineral deposit known to exist prior to the town site application, and subsequently entered by a mineral claimant, the Department, to obviate judicial proceedings, may accept a reconveyance of the land erroneously patented, and thus acquire jurisdiction to pass upon the validity of the mineral entry. *Pederson Lode v. Black Hawk Townsite*, 14 L. D. 186 (1892).

A mineral entry embracing land covered by a prior pending application will be held for cancellation as to the extent of the conflict, unless the second application contains an exclusion thereof. *Rocky Lode*, 15 L. D. 571 (1892).

A patent may issue on the application of a company, although the location was made in the name of an individual in whom the possessory title apparently remains at the date of application, if it is shown that the location was made and assessment work done for and on behalf of the company. In this case the claim was conveyed to the company after application was filed. *Sold Again Fraction M. Lode*, 20 L. D. 58 (1895).

An application should not be allowed where the land embraced therein is covered by a railroad selection, without due notice to the railroad company. *S. P. R. Co. v. Griffin*, 20 L. D. 485 (1895).

The purchaser of a claim after entry, but before patent, takes the land subject to all infirmities of title so far as the government is concerned. *Wingate Placer*, 22 L. D. 704 (1896).

G. *Hearings as to the Character of Land.*

At any time previous to issue of patent the Land Department may direct a hearing for this purpose. These hearings are governed by Rev. Stats. 2335, and L. O. Regs., pars. 109-119.¹

At these hearings the general rule is that the burden of proof is upon the party alleging the character of the land to be different from what it has been returned to be by the surveyor-general. Where, however, the land has been returned as agricultural, a legal location of a mining claim thereon will change the presumption. And where, on the other hand, land has been returned as mineral, evidence of its exhaustion shifts the burden of proof.

The question raised is *whether the land is as a present fact more valuable for mining than for agricultural purposes*. To prove this it is necessary to establish that it contains minerals, and that it is such as to warrant the conclusion that these may be obtained with the aid of known means and appliances, and in profitable quantities. That it contains minerals must be proved as a fact by actual production, and not from theory, or as a conclusion from the existence of minerals in neighboring and adjoining lands. A Department decision does not conclusively establish the character of land. This may be subsequently investigated at any time, so long as the legal title is in the government. But such a decision establishes a presumption of its correctness.

Where a portion of the land is shown to be mineral, the Department may order a segregation survey at the expense of the contestant, and issue a patent for the remainder to the applicant.

LAND OFFICE DECISIONS.

Where land is returned by the surveyor-general as mineral, and is in proximity to known valuable mines, there is a presumption that it is mineral, which presumption can be overcome only by clear and positive proof. *North Leadville v. Searl, Copp*, 274 (1880).

¹ See also circulars July 9, 1894, and 28 Stat. 683; 20 L. D. 350, 561, 571; 21 Aug. 15, 1894, 19 L. D. 21, 105, in regard L. D. 65, 68, 108, to railroad lands, and Act Feb. 26, 1895,

Rev. Stats. 2342 applies to persons who make claims to lands already set apart as agricultural. It contemplates that the land shall be clearly agricultural; it is *prima facie* so by its return as such by the surveyor-general; but that return is subject to contest, the burden of proof being upon the contestant. It is competent for him to show the character of the land, not only absolutely, but relatively, by showing its inferiority for agriculture. *Caledonia M. Co. v. Rowen*, 2 L. D. 714 (1883).

A mineral application for land designated as agricultural, and covered by a homestead entry, must not be received until after a hearing determining its mineral character. The report of the surveyor-general, acting under instructions from the Commissioner, was a sufficient designation of the land as agricultural under the act of July 26, 1866 (Rev. Stats. 2342). *Hooper v. Ferguson*, 2 L. D. 712 (1883).

In a contest between mineral and agricultural claimants, where the land was returned as agricultural by the surveyor-general, the burden of proof is upon the mineral claimant. And he must show, not that neighboring or adjoining lands are mineral in character, or that the land in dispute may hereafter possibly develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that, as a present fact, it is mineral in character; and this must appear from actual production of mineral, and not from any theory that it may produce it. He must show affirmatively, in order to establish his claim, that the mineral value of the land is greater than its agricultural value. *Dughi v. Harkins*, 2 L. D. 721 (1883); *Magalia G. M. Co. v. Ferguson*, 6 L. D. 218 (1887).

Where the tract was returned as agricultural, and the mineral claimants have not shown that it is valuable for mining, but where the evidence shows that a portion of it was formerly embraced by a mining claim; that mineral claimants are working successfully, a short distance northeast of it, a gold-bearing channel which trends south-westerly, and so continuing (as it is believed it does) will penetrate it; that it overlies a system of subterranean gold-bearing channels covered by lava, and has the characteristic outcropping rock; and that the lava surface has decomposed and formed a very poor quality of sandy soil, the major portion of which is inarable without irrigation, — a rehearing may be had at the expense of the mineral claimants. *Magalia G. M. Co. v. Ferguson*, 3 L. D. 234 (1884).

Proof that neighboring lands contain oil is not sufficient to defeat an entry of land returned as agricultural. *Roberts v. Jepson*, 4 L. D. 60 (1885).

The report of a deputy mineral surveyor, upon land applied for as placer ground, that the soil was of a sandy character, composed of disintegrated granite; that the mineral value of the land had not yet been proven, but that it was believed to be equal to that of the many other tracts which have been extensively worked in the district; that the ground was of no value for agriculture, town sites, or timber; that there existed no workings thereon; that the surface was underlaid by a deep bed of gravel bearing placer gold; that its successful working depended upon the united action of the owner of a continuous chain of claims along a certain creek, — does not establish the mineral charac-

ter of the land. The existence of minerals as a present fact must be shown. *John Downs*, 7 L. D. 71 (1888).

The burden of proof is upon an agricultural claimant for land returned as mineral; but the presumption as to the character of the land is not forcible where it appears that, after long continued mining operation over a considerable part of the land, it has been abandoned by mineral claimants as no longer profitable. On issue joined as to the character of land, the question to be determined is whether, as a present fact, it is mineral land, and more valuable for mining than agriculture. *Cutting v. Reininghaus*, 7 L. D. 265 (1888).

The burden of proof is upon an agricultural claimant for land returned as mineral, but after a hearing before the local office as to the character of the land, decided in favor of the agricultural claimant and not appealed from, the burden rests with a mineral claimant who alleges a subsequent discovery of mineral. *Kane v. Devine*, 7 L. D. 532 (1888).

In a contest between a mineral and an agricultural claimant for land returned as agricultural, it rests with the former to show as a present fact that the character of the land is such as to warrant the conclusion that mineral can be obtained therefrom in such quantity and value as to make the land more valuable for mining than agriculture.

In such a case, where a portion of the land is shown to be mineral in character, a segregation survey will be ordered at the expense of the mineral claimant, and patent will issue for balance to agricultural claimant. *Creswell M. Co. v. Johnson*, 8 L. D. 440 (1889); *Tinkham v. McCaffrey*, 13 L. D. 517 (1891).

The burden of proof is upon an agricultural claimant for land returned as mineral to show the fact of its non-mineral character, but he is not required to prove affirmatively that it is agricultural land. In case of a contest between agricultural and mineral claimants for land returned as mineral, the burden of proof is not shifted to the mineral claimant by the non-mineral affidavit and publication of notice by the agricultural claimant. *Mulligan v. Hansen*, 10 L. D. 311 (1890).

A homestead applicant who, during the period of publication under a mineral application, asserts no right in himself, is not thereafter entitled to an order for a hearing, and the denial of such order is not the denial of a right. *Anderson v. Amador & Sacramento Canal Co.*, 10 L. D. 572 (1890).

In case of protest against a mineral application the local office is authorized to order a hearing to determine the character of the claim, and whether there has been due compliance with the mining law. "The order for a hearing was properly made by the local officers. The jurisdiction of the Land Department to order a hearing, to determine whether there has been due compliance with the mining law, is too well settled to admit of extended discussion." *Devereux v. Hunter*, 11 L. D. 214 (1890).

A mineral application will not be allowed if the mineral character of the land does not satisfactorily appear. An application was disallowed where the land appeared to be worthless for mining or agriculture, but valuable for certain hot mineral springs. *Morrill v. Margaret M. Co.*, 11 L. D. 563 (1890).

The proximity of land to coal veins will not warrant the conclusion that it is mineral in character, where it is not returned as such, and its mineral character is not made to appear as a present fact. *John E. Williams*, 11 L. D. 462 (1890).

In an issue as to the character of land that is *prima facie* agricultural, the burden of proof is with the mineral claimant. The coal or mineral character of land must be determined by the actual production from mining on the tract, or by satisfactory evidence that coal or mineral exists on said land in sufficient quantity to make the same more valuable for mining than for agriculture. To establish the tract as coal land, it is not enough to produce testimony showing that lands in the vicinity are coal-bearing. Therefore in the case at bar, although the evidence shows that coal to some extent has been found in adjacent lands, that does not establish as a fact that the land in controversy is of the same character. *Savage v. Boynton*, 12 L. D. 612 (1891).

Where a mineral entry has been allowed on land returned as agricultural, the presumption, as to the character of the land, created by the return, no longer exists, and the burden of proof will thereafter lie with the one who alleges that the land is in fact agricultural.

In an issue joined between a claimant under the mineral law, and an agricultural claimant, the matter to be determined is whether, as a present fact, the land is more valuable for mineral than for agricultural purposes. *Walton v. Batten*, 14 L. D. 54 (1892); *Peirano v. Pendola*, 10 L. D. 536 (1890).

The burden of proof is with one who alleges the mineral character of land that is returned as agricultural. The present existence of mineral in such quantity as to render the land more valuable for mining than agriculture must be shown to defeat an agricultural entry.

In case of an alleged conflict between an agricultural entry and a prior placer claim, the actual extent of the claim should be shown by a survey thereof in accordance with the mining regulations. *Winters v. Bliss*, 14 L. D. 59 (1892).

In determining the character of land alleged to be chiefly valuable for coal, the extent of the deposit may be shown by the testimony of geological experts and practical miners, taken in connection with the actual production of coal. "Coal has actually been produced as a present fact to a sufficient extent to indicate the character of the land. It is shown that a vein of coal underlies the tract at a depth of fifty feet, and at the most remote point from the coal ravine, where it outcrops near the surface to a thickness of six feet. The testimony of the geological expert and that of the practical miner coincide in the conclusion that this coal vein extends under the whole tract. It is a matter of theory, derived from well established indications and conclusions of both geological science and practical mining, and wherever the land is tapped by shaft or drill the theory is reduced to fact, and the coal is found. This evidence, while circumstantial, cannot be rejected without disregarding the results of science and of experience, and, taken in connection with the actual production of coal at one point, leaves no doubt in the mind that the land is coal land, and much more valuable for coal than for agricultural purposes." *Rucker v. Knisley*, 14 L. D. 113 (1892).

Where land has been designated in the public surveys as "coal land," the non-mineral affidavit of a homestead entryman is offset by the affidavit of protest made by one claiming it as coal land, and the burden of proof is upon the former. *Dickinson v. Capen*, 14 L. D. 426 (1892).

The mineral character of land is established by proof of the existence of minerals therein in paying quantities. "It is not necessary that to meet the requirements there should be upon the land a mine in working order from which gold is being actually produced; it is sufficient if it be shown by satisfactory proof that minerals exist in paying quantities, and such proof will usually be based on mining operations or explorations. In the present case it has not been shown that any mining has been carried on on this land. The evidence consists of the testimony of persons, most of them claiming to be expert miners, who went upon this land and panned out small quantities of earth." Upon the testimony of these the land was held to be mineral.

Upon the original survey the land was returned as agricultural. Upon examination and survey by the deputy mineral surveyor, it was returned as mineral and allowed to be entered as such. This latter was an adjudication of the character of the land by the local officers, and thereafter the burden of proof rested on one who sought to attack the mineral character of the land. *Johns v. Marsh*, 15 L. D. 196 (1892); *Aspen Co. v. Williams*, 23 L. D. 34 (1896).

A mineral entry will not be allowed for a lode claim that includes land embraced in a senior location, or intersected by a mill site which is excluded. The exclusion of the mill site is an admission that the land contained in it is non-mineral. *Michael Howard*, 15 L. D. 504 (1892).

A protestant against a mineral entry, alleging the ground to be non-mineral, is not entitled to an order for a hearing in the absence of a specific showing that the land was in fact agricultural at the date of application for patent, where the record discloses that the applicant made the requisite showing as to the character of the land. *Houghton v. McDermott*, 15 L. D. 509 (1892).

Where land is returned as agricultural, the burden of proving it otherwise is upon one alleging it to be mineral; and to prove this it must appear that the land in dispute is valuable for its minerals. The proof must be specific and based on actual production. *Jones v. Driver*, 15 L. D. 514 (1892).

The land in dispute was adjudicated to be mineral in 1872. In 1885 pre-emption entry was made upon it as agricultural; and at the hearing to determine its character, proof was made that the land had been mined over, exhausted of its minerals, and abandoned. This cast upon the mineral claimant the burden of proving that it was at the time of the hearing more valuable for mineral than for agricultural purposes. *Thomas v. Thomasson*, 16 L. D. 52 (1893).

Where land is returned as agricultural, the burden is on a mineral claimant to prove as a present fact that the land is mineral, and more valuable for mining than agricultural purposes. An ordinary assay certificate does not establish, nor is it evidence of, the value of a vein as an entirety; it only indicates the presence of mineral in the

particular piece of matter under treatment. *Dobler v. N. Pac. R. R. Co.*, 17 L. D. 103 (1893).

The presumption as to the character of land created by the return of the surveyor-general does not preclude the assertion of any right or the proof of the facts in the case as they really exist. All mineral lands are excepted from the grant to the railroad company, and until the issuance of patent the Department has jurisdiction to determine whether any of the land within the limits of the grant is mineral, and the exercise of such authority is an imperative duty of the Department. *Winscott v. N. Pac. R. R. Co.*, 17 L. D. 274 (1893).

Testimony of mineral claimants who contest a homestead entry that they had located mining claims does not establish the mineral character. They only testify to a legal conclusion. Discovery must be established. *Eting v. Potter*, 17 L. D. 424 (1893).

When a legal mineral location has been made on land returned as agricultural, the presumption in favor of the return is overcome, and the burden of proof is shifted to the party attacking the mineral entry. *Northern Pac. R. R. Co. v. Marshall*, 17 L. D. 545 (1893); *Sweeney v. N. P. R. R. Co.*, 20 L. D. 394 (1895); *Rhodes v. Treas.*, 21 L. D. 502 (1895).

Land which, when originally surveyed, was returned as third rate, was afterwards located as placer claims, and a return was made by a deputy surveyor confirming the discovery of mineral, showing the necessary expenditure, and the practicability of mining by the hydraulic process. The burden was on the State to show that the land was non-mineral. If it be shown that the land can be profitably mined by the hydraulic process, the Department is not concerned with the question how the locator is to obtain the means or a right of way. If the land is valuable as mineral land, its value as town lots is immaterial. *Washington v. McBride*, 18 L. D. 199 (1894).

A final decision of the Department that land is non-mineral is conclusive up to the period covered by the hearing. It does not, however, preclude a further consideration based on subsequent exploration and development. The Department retains jurisdiction to consider and determine the character of land until deprived thereof by the issuance of patent. *Stinchfield v. Pierce*, 19 L. D. 12 (1894); *Searle Placer*, 11 L. D. 441 (1890).

"Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met," and the land is then no longer open to agricultural entry. *Castle v. Womble*, 19 L. D. 455 (1894).

Protest proceedings in which a general charge is made that certain lands claimed under a railroad grant are mineral, will not conclude another mineral claimant who sets up a specific claim to be subsequently heard on a similar allegation as to the character of the land. No intervention should have been allowed. *Zadig v. Central Pacific R. R. Co.*, 20 L. D. 26 (1895).

A final decision of the Department holding land to be mineral is only conclusive up to the period covered by the inquiry, and will not

preclude a subsequent investigation on allegation that the mining claims thereon have been abandoned, and that the land as a present fact is mineral. *Dargin v. Koch*, 20 L. D. 384 (1895).

Where it is sought to show the agricultural character of land which has once been adjudged to be mineral, the agricultural claimant must allege and prove the abandonment or forfeiture of the mining claim. *McCharles v. Roberts*, 20 L. D. 564 (1895).

The burden of proof rests on a protestant who attacks an agricultural entry on the ground of the known mineral character of the land at date of entry, irrespective of the fact that the land may have been subsequently returned as mineral. *Aspen C. M. Co. v. Williams*, 23 L. D. 34 (1896).

II. ADVERSE CLAIM AND ACTION THEREON.

At the expiration of the sixty days of publication, the statute (Rev. Stats. 2325) creates the presumption that the applicant is entitled to a patent upon payment for the land, and that no adverse claim exists, unless such a claim has been filed with the register and receiver of the proper land office within the period of publication. If the applicant has complied with the law, no third party who has failed to file an adverse claim will then be heard to make objection to the issuance of the patent, except to show that the applicant has failed to comply with the requirements of the statutes. Therefore all rights and claims adverse to and conflicting with those of the applicant can be preserved only by the timely filing of adverse claims, unless they are rights which from their nature cannot be concluded or affected by the patent, if issued. A previous patentee need not file an adverse claim, nor need a previous applicant for a patent for the same claim against subsequent applications while his own is pending; nor a previous locator of a lode claim as against an application for a placer patent for ground including his lode. But such a locator, whose location was made subsequent to the date of the application for a placer patent, must file his adverse claim. So also must the patentee of a placer claim when a lode applicant claims a lode within his boundaries, and alleges that it was known at the date of the placer application.

The locator of a cross vein need not file an adverse claim, except as to the space of lode intersection, nor the locator of a vein which unites with the applicant's vein, but whose junction is unknown. The owner of an easement acquired under and protected by Rev. Stats. 2338-40, or 2477, need not protest; nor lienholders,

for they are protected by Rev. Stats. 2332. And the locator of a vein under the provisions of the act of 1866 need not do so in order to preserve his right thereto as against a patentee of a claim under the provisions of the act of 1872. One setting up a trust upon the ground that he is a co-tenant with the applicant, or that the applicant located as his agent, need not file an adverse claim against the application of the alleged trustee; and if he does so, he may not establish his equitable title in the action thereon. Generally those who hold valid government grants need not file adverse claims.

On the other hand, the holder of a title derived by judicial sale prior to the expiration of the sixty days of publication, the claimant of land as a town lot, a co-tenant who has not been joined in the application because of alleged default and consequent forfeiture of interest, and all other claimants whose *title does not itself already rise to the dignity of a grant*, must, in order to preserve their rights, file adverse claims in the proper land office. The policy of the law is to require all rights and equities to the premises sought to be purchased, and which are adverse to the title upon which the applicant relies, to be adjusted prior to the issuance of the patent. The right to file an adverse claim belongs to every one having a claim to an interest in the land, of whatever kind, and is not affected by the character of the land.

The adverse claim must be filed with the register and receiver of the proper district before the expiration of the period of publication. In calculating these sixty days the first day is excluded, and if the last day falls on Sunday or a legal holiday, the claim may be filed on the following day. The fact that the actual publication by reason of being made in a weekly paper runs for more than sixty days, does not extend the time within which the adverse claim must be filed. The claim is not filed until the fees therefor are paid.

The form of the adverse claim is prescribed by Rev. Stats. 2326. It must be upon oath of the claimant or claimants, and must show the nature, boundaries, and extent of the adverse claim to each application. A second application will be treated as an adverse claim. What is necessary to be done in order to satisfy the act and the Department is set out in L. O. Regs., pars. 82-88. Objections to the form of the claim must be made in the Land Office. The court, in an action on an adverse claim, has

no jurisdiction to determine whether the claim conforms to the Land Office rules. It has nothing to do with the Land Office proceedings.

From the decision of the register and receiver on these questions there is an appeal to the Commissioner of the General Land Office. But a failure to comply with the regulations may be, upon sufficient excuse, treated as a mere irregularity, and not as an incurable defect. The Department, however, may not waive any of the statutory requirements, nor may the parties dispense with them by agreement. If the decision of the Land Department is adverse to the sufficiency of the claim filed, the Department proceeds as though it had not been presented. When, however, an adverse claim is regular and is duly and properly filed, it becomes "the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with diligence to final judgment." (Rev. Stats. 2326.) The suit may be brought before the filing of the adverse claim, if the latter is done within the proper time. A United States Circuit Court is a court of competent jurisdiction, as the questions involved arise under the laws of the United States, and the United States, being substantially a party, are entitled to have their rights determined in their own courts. The State courts are also courts of competent jurisdiction if they have jurisdiction over the land in question. The actions for the determination of the question of the right of possession under this provision must be instituted according to the forms and practice within the jurisdiction where the suit is begun. The remedial law of that jurisdiction is applicable, and consequently the State Statute of Limitations. In such actions only those who have filed claims in the Land Office and show a legal interest can be made parties, or can intervene as parties. One who has failed to file an adverse claim cannot attack the applicant's certificate on the ground that an action is pending upon an adverse claim of another under whom he claims no right.

The filing of a complaint is the commencement of proceedings; but this question may be decided by each court for itself, for its decision by a State court is not a federal question. When the defendant has answered and gone to trial, it is too late to raise

the objection that the complaint was not filed within the time required by the statute. Where the action is for any reason dismissed, it is at an end, and cannot be reinstated. Nor will another action relate to the date of the first. If it is not begun within the statutory thirty days, it is without effect on the action of the department.

Since an action upon an adverse claim is subject to the rules of procedure of the particular jurisdiction in which it is brought, upon those rules will depend the form of action and the nature and contents of the pleadings; but there are certain essentials of the action arising from the nature of the question to be determined which are equally necessary in every jurisdiction. In order that either party to the action should prevail, it is necessary that he should establish a good possessory title, a compliance with the statutes, State and Federal, and local mining rules and regulations in force relating to the location and holding of mining claims. This compliance must consequently be alleged in the complaint, as well as the possession or ouster of the plaintiff. There must also be allegations that the adverse claim was filed in time and the suit begun in time. Otherwise the court is unable to construct a judgment and give the necessary information to the Land Office. These allegations may be traversed. But whether or not the adverse claim is regular or sufficient is for the Land Department, whose determination is not subject to the control of the court, and if the allegation that the adverse claim has been filed is not traversed, the plaintiff will not be required to prove it.

The action may be either at law or in equity, as may be appropriate under the peculiar circumstances of each case.¹ As the action is a *possessory* one, it must take upon itself one of two forms, according as the plaintiff is in or out of possession.² In the latter case, proof of possession must be made; in the former, proof of the right of possession is sufficient. But mere title by occupancy is not enough to satisfy the terms of the act; a valid location which entitles the claimant to possession against the United States, as well as the other claimant, must be alleged and proved.

¹ The view of Judge Ross in *Doe v. Waterloo M. Co.*, 43 Fed. 219, that a bill in equity is the only proper form of action, is overruled by *Perego v. Dodge*, 163 U. S. 160.

² Montana, Code Civ. Proc. 1895, sec. 1322; New Mexico, Act Feb. 1, 1887, p. 204; Act Feb. 28, 1889, p. 276.

Citizenship must be alleged and proved. So, if the location was made by a corporation, must its organization and the qualification of its members. The compliance with local regulations must be established. The claimant must in every particular establish his right to a patent. If his own admissions preclude a discovery by him, he may not recover. Whether the requirements of the statutes and regulations have been complied with is a question of fact. The plaintiff is not confined to such title to the ground in controversy as he had at the beginning of the action. He may by supplemental complaint bring in other adverse claims, though his rights thereunder were acquired after the action was begun.

An action on an adverse claim differs from other possessory actions in that a failure on the part of the plaintiff to establish his case does not necessarily result in a verdict and judgment for the defendant. It is provided by the act of Congress of March 3, 1881, "that, if in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the Land Office nor be entitled to a patent for the ground in controversy until he shall have perfected his title." The effect of this act is that each party is an actor, and must establish his claim not only against his adversary, but also against the government. There are no presumptions and no burden of proof. If no evidence of title is given on either side the case will be dismissed. A verdict generally for plaintiff or defendant is not good. The jury must find which party, if either, is entitled to possession by virtue of a compliance with the statutes and regulations governing the location of mining claims. Where the jury find that neither party has proven title, both parties are left without right to a patent for the premises in controversy. It is, however, a sufficient defence to set up that the defendant's right to a patent was not adversely by a claim under which the plaintiff claims.

The proceedings upon the adverse claim in a court of competent jurisdiction act as a stay upon the proceedings in the Land Office. "All proceedings except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent

jurisdiction, or the adverse claim waived." (Rev. Stats. 2826.) The section further provides that the action in court shall be prosecuted by the adverse claimant with reasonable diligence to final judgment, "and a failure to do so shall be a waiver of his adverse claim."

The question of diligence is for the determination of the court, and after the suit is begun the Commissioner of the Land Office may not issue a patent, on the ground that the adverse claimant is not prosecuting the action diligently. When once the action is begun, the function of the Land Department is suspended. It cannot resume jurisdiction upon the ground of waiver.¹ The court alone can decide when the controversy is at an end, or when a waiver has taken place, and the Department can do nothing until the judgment of the court is certified to it, when it is bound by that judgment, whatever it may be.² Where the Department has erroneously assumed to act upon the ground of waiver, its action cannot be attacked by one who has not filed an adverse claim to the application. But no patent issued pending the proceedings can be set up to affect the result.

Where the adverse claim covers only a part of the applicant's claim, the whole proceeding must stop and await the determination of the proceedings, even though the applicant relinquishes all claim to the part in conflict. He may, however, by confession of judgment obtain a decree of a competent court which will make it possible for him to proceed as to the rest of his claim.

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the Land Office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim or such portion thereof as the applicant shall appear, from the decision of the court, to

¹ Land Department to the contrary, one whose rights cannot be affected by the patent, the proceedings will not be delayed thereby.
see *post*, p. 409.

² Where an adverse claim is filed by

rightly possess. If it appears from the decision of the court that several such parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever." Rev. Stats. 2326.

The way in which the judgment must be certified to the Land Department is provided by L. O. Regs., pars. 89-92. This judgment, when certified, is absolutely binding on the officers of the Land Office, and the subsequent action of the Department must not conflict with it. The judgment, however, does not give the party in whose favor it is entered an absolute right as against the government. It only establishes the right of possession, and the government may still inquire into the character of the land, and whether the requirements and conditions of the law have been complied with. The judgment to control the Land Department must be based upon the record presented in the Department.

A purchaser of a mining claim, pending adverse suits thereon, takes subject thereto.

One who has failed to file his adverse claim, or to commence suit in time, may yet be heard in the Land Department, — he may as a *protestant*, and not as an adverse claimant, show, under the provisions of the last clause of Rev. Stats. 2325, "that the applicant has failed to comply with the terms of this chapter." He remains a party to the record in the Land Department. If he merely alleges the applicant's non-compliance with the law, he stands in the position of *amicus curiæ*, and is not entitled to appeal from the decision of the Commissioner. It is otherwise if he alleges in himself an interest, present or prospective, depending on the final result of the proceedings.

United States. *420 M. Co. v. Bullion M. Co.*, 3 Sawy. 634 (1876), C. C. D. Nev. Sawyer, J.: "It was the intention of Congress to give the right of purchase of a mining claim to a silver or gold bearing lode or vein, to the person or association who, in pursuance of the laws of the State or Territory, and the local mining

customs, rules, and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner, and entitled to the possession as against everybody except the government of the United States." "And this is simply a right to purchase, a privilege given to the party of which he may avail himself or not, exactly like a pre-emption law and founded upon similar reasons and policy. . . . The case is nowise like the case of an inchoate, imperfect Spanish grant; but is in all respects like a case under the pre-emption laws. The object of a determination of the right by litigation, where there is an adverse claim is simply to ascertain the party who has the right to the claim under the laws of the State and local rules and customs; for that person, when found, is the party upon whom the law confers the privilege, — the right to purchase."

Frank G. & S. M. Co. v. Larimer M. & S. Co., 8 Fed. 724 (1881), C. C. D. Colo. Where an application for a patent for a mining claim was met by an adverse claim, and a complaint was filed in a State court and the cause removed, after answer, to the Circuit Court, *held*, on a motion to remand, that this court had jurisdiction under the act of March 3, 1875, as the questions involved in the case arise under the laws of the United States.

Jackson v. Roby, 109, 440 (1883). Where in an action on an adverse claim the jury find that neither party has proven title, the effect is to leave the applicant without any right to a patent so far as the premises in controversy are concerned, and to leave the protestant in no better position.

Chambers v. Harrington, 111, 350 (1884), affirming *Harrington v. Chambers*, 3 Utah, 94, *post*. The decision of the court of competent jurisdiction upon adverse claims to a patent under Rev. Stats. 2325, 2326, is subject to review in the Supreme Court of the United States when the amount in controversy is sufficient.

Bay St. S. M. Co. v. Brown, 21 Fed. 167 (1884), C. C. D. Nev. Action on adverse claim under Rev. Stats. 2326. The complaint alleged that "prior to the 25th day of August, 1881, the plaintiff was, and ever since has been and now is, the owner (subject only to the paramount title of the United States), and in the possession, and entitled to the possession, of that certain mining claim . . . known and called the Bay State mine, and located on the 2d day of February, 1871, and duly recorded," etc. The defendant by his answer denied "that the said plaintiff was upon the 25th day of August, 1881, or for a long time prior thereto, or that it ever since has been or now is, either the owner or in the possession, or entitled to the possession, of that certain mining ground and claim situate, . . . known, and called the Bay State mine, as alleged in said complaint;" and after denying the other material averments of the bill, further alleged a location by defendant on August 25, 1881. The answer was sufficient to put the plaintiff upon proof. It was unnecessary to deny the location in 1871, or that the plaintiff ever owned or was in possession of the mining claim. The issue was the ownership upon August 25, 1881, and subsequent thereto. "On this issue there is no ambiguity in defendant's answer; and upon the trial plaintiff was put upon its proof of title and right of possession thereof. And, on the other hand, defendant was equally

put upon proof of his title to the Ida May lode before he could ask a decree in his favor adjudging him to be the owner thereof. In suits of this nature the better title must prevail, and judgment must be for the party establishing that better title." There are no presumptions, but the facts must be shown by the proofs. When no evidence of title is given on either side, the suit will be dismissed for want of proofs.

Richmond M. Co. v. Rose, 114, 576 (1885), affirming *Rose v. Richmond M. Co.*, 17 Nev. 25, *post*. The filing of the complaint in the court of competent jurisdiction is the commencement of proceedings by an adverse claimant to determine the right of possession to mineral lands under Rev. Stats. 2326. Where defendant in such a proceeding answers, and goes to trial, it is too late to raise the objection that the complaint was not filed within the time required by the statute. A decision of a State court upon the question of what constitutes the commencement of an action in that court is not a federal question. It is not competent for officers of the Land Department, while a proceeding under Rev. Stats. 2326 is pending in a court of competent jurisdiction, to assume, from delay in placing the cause upon the trial calendar, or taking proceedings therein, that an adverse claim has been waived, and to issue a patent for the mineral lands in dispute as if no adverse claim had been made.

A title founded on a patent procured by an independent application for a different mineral tract, applied for and issued pending proceedings under Rev. Stats. 2326, cannot be set up in these proceedings to affect the result of the litigation in them. Miller, J.: "Looking at the scheme which this statute presents, and which relates solely to securing patents for mining claims, it is apparent that the law intended, in every instance where there was a possibility that one of these claims conflicted with another, to give opportunity to have the conflict decided by a judicial tribunal before the rights of the parties were foreclosed or embarrassed by the issue of a patent to either claimant. The wisdom of this is apparent when we consider its effect upon the value of the patent, which is thereby rendered conclusive as to all rights which could have been asserted in this proceeding, and that it enabled this to be done in the form of an action in a court of the vicinage, where the witnesses could be procured, and a jury largely of miners could pass upon the rights of the parties under instruction as to the law from the court.

"It is in full accord with this purpose that the law should declare, as it does, that when this contest is inaugurated the land officers shall proceed no further until the court has decided, and that they shall then be governed by that decision; to which end a copy of the record is to be filed in their office. They have no further act of judgment to exercise. If the court decides for one party or the other, the Land Department is bound by the decision. If it decides that neither party has established a right to the mine or any part of it, this is equally binding as the case then stands. With all this these officers have no right to interfere. After the decision, they are governed by it. Before the decision, once the proceeding is initiated, their function is suspended."

Gwillim v. Donnellan, 115, 45 (1885). In proceedings under Rev. Stats. 2325, 2326, it is incumbent upon the plaintiff to show a location which entitles him to possession against the United States as well as against the other claimant; and, therefore, when plaintiff at the trial admitted that a part of his claim wherein his discovery shaft was situated had been patented to a third person, the court rightly instructed the jury that he was not entitled to recover any part of the premises, and to find for defendant. There was then no discovery to support the location of the rest of the claim.

McEvoy v. Hyman, 25 Fed. 539 (1885), C. C. D. Colo. See this case on p. 423.

Wolverton v. Nichols, 119, 485 (1886). A. having applied for a patent for a placer mine in Montana, B. filed an adverse claim in the register's office, and commenced suit for the settlement of the controversy in a District Court of the Territory, according to the provisions of Rev. Stats. 2326. In the course of the trial it appeared that before the commencement of the suit B. had agreed with C., by a sufficient instrument under seal, to convey the premises in dispute to C., "by good and sufficient deed of conveyance duly acknowledged," and that C. was in possession when the suit was begun, and still remained in possession. The Code of Civil Procedure of Montana, sec. 354, provides that "an action may be brought by any person in possession, by himself or his tenant of real property, against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim, estate, or interest." The court ordered a nonsuit, which judgment was affirmed by the Supreme Court of the Territory. This court reverses the judgment of the Supreme Court, and holds that as C. was holding under B., and as B. was bound to C. to have the title quieted, B. had the right to have the verdict of the jury on the questions of fact at issue, so as to settle the question which the act of Congress required to be settled.

Hamilton v. Southern Nev. G. & S. Min. Co., 33 Fed. 562 (1887), C. C. D. Nev. The holder of a title by constable's or sheriff's sale before the expiration of the period of publication cannot set up his title against the certificate of purchase unless he has filed an adverse claim.

One who has not filed an adverse claim cannot attack the certificate on the ground that an action is pending upon the adverse claim of another under whom he claims no right, though the certificate was obtained upon the dismissal of this action, which has since been reinstated.

Hunt v. Patchin, 35 Fed. 816 (1888), C. C. D. Nev. Complainant and defendant being joint owners of a mining claim, by agreement abandoned it, and defendant relocated it in his own name for the benefit of himself and the complainant. Complainant brought this suit to enforce a trust as to his share; and while it was pending, defendant made application for a patent, and no adverse claim having been filed, paid the purchase-money and obtained a certificate of entry. This certificate did not conclude the complainant's right.

"The claim by complainant of a trust was not adverse to the possessory title upon which the entry was made; but a part of that title,

and the trust which had attached before the entry, followed the title upon the entry based upon the possessory title of which it was a part. The complainant is entitled to the benefit of this entry to the extent of the trust."

Steves v. Carson, 42 Fed. 821 (1890), C. C. D. Colo. Plaintiff having begun suit on an adverse claim within thirty days after filing the same, it was dismissed because no summons was issued within one month of filing the complaint. Within a year thereafter, but after the expiration of the thirty days, he began another suit, relying on Gen. Stats. Colo. 1883, sec. 18, p. 673, which provided that in case of failure of a suit for certain formal matters, plaintiff might renew it within a year. The action was held to be too late.

Hallett, J.: "This proposal to ingraft a statute of the State upon an act of Congress does not appear to be within any recognized principle of construction. It is true that State Statutes of Limitation are often enforced in federal courts, when, like other laws of the State, they enter into the contract and become binding on both parties. But they have no application in a proceeding for disposing of public land, of which Congress has exclusive jurisdiction." "This act admits of no addition or modification from the statute of the State; and where, as in this instance, the claimant commences suit in due time and is cast in his suit, he is without remedy, except such as may be obtained in the same suit on appeal or writ of error."

Iron S. M. Co. v. Campbell, 135, 286 (1890). The provisions in Rev. Stats. 2325, 2326, as to adverse claims do not apply to a person who, before the publication first required, had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States, had established his right to the land claimed by him, and had received his patent therefor.

Miller, J.: "When he has once obtained the patent of the United States for his land, he should be only required to answer persons who have some established claim, and to contest with this party not before the administrative departments, but in courts of justice, by the regular proceedings which determine finally the rights of parties to property. . . . We have more than once held that when the government has issued and delivered its patent for lands of the United States, the control of the department over the title to such land has ceased, and the only way in which the title can be impeached is by a bill in chancery; and we do not believe that, as a general rule, the man who has obtained a patent from the government can be called to answer in regard to that patent before the officers of the Land Department of the government."

Burke v. Bunker Hill & S. M. & C. Co., 46 Fed. 644 (1891), C. C. D. Idaho. A suit on an adverse claim brought under Rev. Stats. 2326, as amended by act of March 3, 1881, is a suit arising under the laws of the United States, and consequently within the jurisdiction of the federal courts, irrespective of the question involved.

The United States are substantially, though not formally, a party, and are entitled to have their rights determined in the federal courts.

Turner v. Sawyer, 150, 578 (1893). A co-tenant who proceeds surreptitiously to obtain a patent, in disregard of the rights of his co-tenants, holds the title thus acquired in trust for the true owners. A bill in equity will lie to enforce such a trust.

These co-owners were not obliged to file adverse claims. "In this case there was no conflict between different locators of the same land, and no contest with regard to boundaries or extent of claim, such as seems to be contemplated in these provisions."

Doe v. Waterloo M. Co., 70 Fed. 455 (1895), C. C. Ap., 9th Circ. If in an action on an adverse claim title is established in one of the parties, the act of March 3, 1881, does not require that the court should determine his right to a patent as against the government. That is still in the jurisdiction of the Land Department.

Perego v. Dodge, 163, 160 (1896). The form of action on an adverse claim is not provided by the statute, "and apparently an action at law or a suit in equity would lie, as either might be appropriate under the peculiar circumstances, an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

The amendatory act of March 3, 1881, did not have the effect of requiring that this class of cases must be disposed of on trial by jury. "We do not think the intention of this act was to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the Land Office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the Land Department, and the object of the amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either, and while the finding by a jury is referred to, we think that, where the adverse claimant chooses to proceed by bill to quiet title, and as between him and the applicant for the patent neither is found entitled to relief, the court can render a decree to that effect, just as it would render judgment on a verdict if the action were at law. If Congress had intended to provide that litigation of this sort must be at law, or must invariably be tried by a jury, it would have said so. There is nothing to indicate the intention thus to circumscribe resort to the accustomed modes of procedure, or to prevent the parties from submitting the determination of their controversies to the court."

Eclipse G. & S. M. Co. v. Spring, 59, 304 (1881). See **California.** this case under Chap. XV., Div. I., A.

Mont Blanc Consolidated Gravel M. Co. v. DeBour, 61, 364 (1882). In an action brought under Rev. Stats. 2325, 2326, to determine the right of possession to a mining claim, those only who have filed claims to the land in the United States Land Office can properly be made parties, and such parties only can intervene.

Lee Doon v. Tesh, 68, 43 (1885). In an action brought by several adverse claimants in pursuance of Rev. Stats. 2326, the complaint must allege that the plaintiffs are, or have declared their intention to become, citizens of the United States. If the complaint alleges one of the plaintiffs to be a citizen, and contains no allegations as to the citizenship of the others, the action should be dismissed as to the latter.

No title to mining claims on the public lands acquired by location, occupancy, and working prior to 1866 was or is valid as against the United States or their grantees. As against the government such occupants were trespassers, and not being citizens, or having declared their intention to become such, had no right to be protected by the act of 1872.

Champion M. Co. v. Con. Wyoming G. M. Co., 75, 78 (1888).. Where the junction of two veins is unknown at the time the owner of one applies for a patent, the owner of the other is not concluded by the proceedings in the Land Department. He could have no standing as an adverse claimant.

Anthony v. Jillson, 83, 296 (1890). In an action under Rev. Stats. 2326, each party is an actor, and must establish his claim against the government as well as against his adversary. He must allege in his pleadings all the facts which are essential to the validity of his claim; as, the citizenship of the locators.

Quigley v. Gillett, 101, 462 (1894). In an action on an adverse claim, the court has nothing to do with the proceedings in the Land Office, and has no power to determine their regularity or irregularity, sufficiency or insufficiency.

Where an adverse claimant sets up a title based on a location subsequent to that of the applicant for patent, the burden is upon such claimant to prove that the applicant has forfeited his right by failure to perform the annual work.

McGinnis v. Egbert, 8, 41 (1884). Verdicts in actions Colorado. under Rev. Stats. 2326, as amended by act of March 3, 1881, should find which party, if either, is entitled to possession by virtue of a compliance with the statutes of the United States and of the State. A verdict merely for plaintiff or defendant is not good.

Rockwell v. Graham, 9, 36 (1885). A right of way for a flume to conduct water is an easement which is protected by the provisions of Rev. Stats. 2339-40, and is not ground for an adverse claim to land for which application has been made as a placer mining claim.

Lee v. Stahl, 9, 208 (1886). The effect of Rev. Stats. 2336 is to exclude a cross lode, except at the point of lode intersection, as not a subject of grant. It follows that the right to it is not lost by failure to adverse. But this does not include the space of lode intersection. If a prior locator would secure this, and other rights which he has by virtue of his prior location, he must adverse, and this whether his prior location was made under the act of 1866 or the act of 1872. It is true that Rev. Stats. 2344 provides that nothing contained in this chapter shall be construed to impair in any way rights or interests in mining property acquired under existing laws; but other sections of the act provide the mode and manner in which rights shall be asserted and secured by adversary proceedings, and a failure to assert prior rights is treated as a waiver.

The policy of the law is to require all rights and equities to the premises sought to be purchased and patented to be adjusted prior to the issuance of the patent, to the end that it may be impregnable against all comers.

Becker v. Pugh, 9, 589 (1886). Before either party can recover in

an action on an adverse claim, he must satisfy the requirements of the statutes, State and Federal, and local miners' rules and regulations in force relating to the location of mining claims. Title by occupancy merely does not satisfy the terms of the act. A requirement of miner's regulation that a claim be "staked off" means, it seems, that the boundaries, at least the course of the veins, be marked with stakes. It is not complied with by erecting one stake containing a notice. To support an adverse filed under Rev. Stats. 2326, an action in the nature of ejectment is proper. Some of the rules relating to ejectment are, however, modified in such causes. No proof of actual ouster is necessary, and an action may, upon proper showing, be maintained when plaintiff or when no one is in possession.

Bryan v. McCaig, 10, 309 (1887). Under act of Congress, March 3, 1881, the claimant in an adverse suit must establish his right by evidence of a compliance with the statutes relating to the location and holding of mining claims. Whether these requirements have been complied with is a question of fact for the jury. Evidence that annual labor has not been performed is admissible, though not pleaded specially.

Doherty v. Morris, 11, 12 (1887). In an action on an adverse claim, the fact that one of the original owners conspired with the person who relocated the property as an abandoned lode to make default on the assessment work, is immaterial, when as a matter of fact the work was not done. In such an action an original owner may not establish an equitable title in the relocation. In this proceeding he can only show title in himself as against the applicant for a patent.

Manning v. Strehlow, 11, 451 (1888). In an action on an adverse claim, the issue is whether either party is entitled to a patent. "To entitle a party to a judgment in his favor, it must appear that he has not only the right of possession, but that he has made a valid location of the premises in controversy, and, by virtue of a compliance with all the requirements of the mining law, is entitled to a patent from the government." An instruction that it is for the jury to determine who had possession and who had the right of possession at the commencement of the action is erroneous, and a verdict rendered thereunder that "the jury find the issues for the plaintiff that he was in possession . . . at the time of the commencement of this action, and is now entitled to possession thereof," is bad. In such an action the objection that plaintiff had parted with his interest to his wife is not sustained by proof of a deed of a lode of another name, which name many years before was applied to this lode or a part of it, the grantee testifying that she knew both claims, and that her deed did not cover any part of the lode in controversy.

Bushnell v. Crooke M. & S. Co., 12, 247 (1888). In an action on an adverse claim a verdict in the following words is good: "We find the issue joined for the plaintiff, and that he is the owner of, and entitled to the possession of, the ground described in the complaint."

Marshall S. M. Co. v. Kirtley, 12, 410 (1888). The object of an action brought in support of an adverse claim being to determine the plaintiff's right of possession and title under such claim, it becomes a material question in the case whether the requirements of the statute

in relation to the filing of such claims have been complied with; and an allegation in defendant's answer that his right to a patent was not adversely by a claim under which plaintiff claims the right of possession to the premises in controversy, presents a defence as against such a claim.

An adverse claimant is not confined to such title to the premises in controversy as he had at the time the action was begun. He may be permitted to bring other adverse claims by supplemental complaint, if the same have been duly filed and brought within the time limited by law, although his rights thereunder were acquired after the action was begun.

Thomas v. Chisholm, 13, 105 (1889). In a proceeding on an adverse claim, a party basing his title upon a location by a corporation must allege and prove the organization of the corporation and the qualification of its members.

Hunt v. Eureka Gulch M. Co., 14, 451 (1890). Application for patent was made on October 26, and publication of notice begun on October 31, and continued to January 2 inclusive. Adverse claim was filed on January 1. This was too late, and suit thereon was dismissed. The adverse claim must be filed within sixty days, and the time is not extended by the fact that publication when made in a weekly paper must be for sixty-three days. An action begun on an adverse claim cannot be maintained as an ordinary action to quiet title when it appears that it will fail under Rev. Stats. 2326.

Keeler v. Trueman, 15, 143 (1890). Title to a mining claim is real estate, and descends to the heirs of the owner. Consequently where an administrator filed an adverse claim to an application for a patent, and began suit thereon, alleging a title by location in his decedent, a demurrer to the complaint was sustained on the ground that he was without interest. The rights of the decedent in the claim descended to his heirs.

An allegation of citizenship is absolutely necessary in an action on an adverse claim.

Seymour v. Fisher, 16, 188 (1891). It is the settled policy of the government that all controversies relating to conflicting mining claims be so far as possible adjudicated prior to patent. The method of so doing is provided by the statutes providing for adverse claims and proceedings thereon. If a prior claimant "does not avail himself of the proceedings thus provided for him, the superior advantages obtained by virtue of his priority of discovery and compliance with the location statutes may be lost. Failing to invoke the statutory remedy given, and permitting his adversary to secure a patent covering his location or a part thereof, he will be treated in law as having voluntarily waived his prior and superior rights."

Kannaugh v. Quartette M. Co., 16, 341 (1891). A party who files his adverse claim in due time, but afterwards allows the action thereon to be dismissed for failure to prosecute, stands in no more favorable position than if he had failed to file an adverse claim.

He cannot be permitted to show in an action to recover the property from him that the plaintiff (party applying for the patent) had not fully complied with the law.

People v. District Court, 19, 343 (1894). One who purchases a mining claim during the pendency of adverse suits thereon takes the property subject to the rights of the parties in litigation. It is not necessary that notice of a *lis pendens* should have been filed as required by Civil Code of 1887, sec. 277, which requires such notice of actions for the possession of real property.

Suessenbach v. First Nat. Bank, 5, 477 (1889). The locators of a placer mining claim, having an understanding with adjoining locators by which they were to lay out a town on their claims, conveyed a lot in the city of Deadwood, being part of their claim, to a banker, who erected a banking house thereon. The grantees of the original locators, when they obtained a patent for the whole claim, held it subject to a trust in favor of the grantees of this lot to the extent of their conveyance. It was not the duty of the latter to file an adverse claim.

Rosenthal v. Ives, 2, 244 (1887). In an action brought under Rev. Stats. 2326, and the act of 1881 amendatory thereof, in support of an adverse claim, it is necessary that one claimant should show a superior title as against the government, and a right to a patent to the claim in dispute, or a part thereof, before he is entitled to a verdict. In such an action the plaintiff must allege and show that he and the locator under whom he claims are, or have declared their intention to become, citizens.

Back v. Sierra Nev. Con. M. Co., 2, 386 (1888). A tunnel location is a mining claim within the meaning of Rev. Stats. 2326, and the locator may protect his rights therein by means of an adverse claim.¹

Cronin v. Bear Creek G. M. Co., 2, 1146 (1892). A complaint in an action on an adverse claim, under Rev. Stats. 2326, which fails to show that plaintiff has filed his adverse claim within the period prescribed by Rev. Stats. 2325, and brought the action within the time thereafter allowed by Rev. Stats. 2326, is defective. So also is such a complaint if it does not show wherein the location alleged to have been made by the defendant conflicts with that made by the plaintiff, or whether it conflicts at all. Without such allegation it would be impossible to construct a judgment which would determine the rights of the parties, or give the necessary information to the officers of the Land Department without going outside the complaint to the evidence.

Burke v. McDonald, 2, 646 (1890). In an action on an adverse claim, the filing of the adverse having been alleged, and not denied by the pleadings, it is not necessary to prove it.

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Defendant at the time of purchasing the claim in controversy and application for patent was an alien but was made a citizen on the day of trial. *Held*, this had no retroactive effect, and he was properly nonsuited.

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Plaintiff was not estopped by reason of failure to file an adverse claim.

Brundy v. Mayfield, 15, 201 (1895). Where part of the co-owners of a claim apply for a patent to themselves, an excluded co-owner need not file an adverse claim. On obtaining the patent, they become trustees for him. Co-tenants stand in a relation of confidence to each other, and neither will be permitted to act in hostility to the other in reference to the joint estate.

420 M. Co. v. Bullion M. Co., 9, 240 (1874). The acts of Nevada. Congress 1866, 1870, and 1872 did not confer any additional jurisdiction on the State courts. The object of Rev. Stats. 2326 was to require the parties protesting against the issuance of a patent to go into the State courts of competent jurisdiction and institute such proceedings as they might under the different forms of action therein allowed, elect; and there try the rights of possession to such claim and have the question determined. When the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in the State courts, irrespective of the acts of Congress. Consequently the State Statute of Limitations may be applied.

Golden Fleece G. & S. M. Co. v. Cable Consolidated G. & S. M. Co., 12, 312 (1877). Actual possession in the plaintiff, though alleged, is not essential to be proved. A right of possession is all that is essential.

Proof of a clearly defined surface claim surveyed and marked by a United States surveyor in accordance with law, including a quartz lode running with the claim, and of work on the vein inside of the surface claim and within the lines of the disputed grant, is proof of possession sufficient to put the defendant on proof of his right.

"All that the government requires to be done in order to obtain its license to so occupy is prescribed by the law; and, in the absence of local rules, a compliance with the public law will secure the claim. The miners in their respective districts may, if they choose, exact something more; but they are not obliged to do so, and no court, in the absence of proof, will presume that they have done so."

"Proof of a record is totally irrelevant, without proof of some regulation making a record obligatory or giving it some effect." For neither of these does the law provide, leaving their enactment to the miners of the respective districts.

Rose v. Richmond M. Co., 17, 25 (1882), affirmed in *Richmond M. Co. v. Rose*, 114 U. S. 576, *ante*. In an action upon an adverse claim it is not necessary, under section 1674 of the Compiled Laws (Stats. 1873, 50), to allege in the complaint the particulars of defendant's claim, and prove that it was invalid, nor to allege the filing of the protest.

An objection that a protest does not show the nature, boundaries and extent of the claim should be made in the Land Office where the protest is filed. It is questionable whether any objection could be allowed against the protest after the commencement of the suit. A protest claiming two hundred feet in width upon the surface of a claim more than two hundred feet in width sufficiently shows the nature, boundaries, and extent of the claim.

The question of diligence in prosecuting a suit on an adverse claim

under Rev. Stats. 2326 is for the determination of the court itself, and after such a suit is once begun, the Commissioner of the Land Office has no power to decide that the claimant is not prosecuting his suit with reasonable diligence and to issue a patent, until judgment has been certified to him in the action.

Steel v. Gold Lead M. Co., 18, 80 (1883). Where an adverse claim has been filed to an application for a patent to a mining claim and an action instituted under sec. 1674, Compiled Laws, the defendant need not plead specially a forfeiture for failure to comply with local rules. The rule is otherwise in ejectment to recover possession of mining ground.

Where a person has regularly applied for a patent to a mining claim, he need not, in order to preserve his rights, protest against any subsequent application for the same ground while his own application is pending. He is entitled to be heard and have his rights determined in the proper form wherever they are questioned, whether in the State court or in the Land Office.

J. applied for patent to certain mining claims, and in a subsequent suit upon an adverse claim was successful, and caused the judgment to be certified to the Land Office. C. applied for a patent to a mining claim part of which was included in J.'s claim. E., who had not protested against J.'s claim, did protest against C.'s application. In an action thereon, C. offered in evidence a deed from J. to C. for the ground in controversy. *Held*, admissible. C. succeeded to J.'s rights against E., but neither C. nor E. had any right to ground for which J. had obtained judgment.

Deno v. Griffin, 20, 249 (1889). An adverse claimant whose suit has been dismissed, cannot be heard to object that a patent subsequently issued was based upon a payment of purchase-money made during the pendency of his suit.

Blake v. Butte S. M. Co., 2, 54 (1877). The patentee of a claim under the act of 1866 is not bound to file an adverse claim to protect his vein against the rights of patentees under the act of 1872.

Harrington v. Chambers, 3, 94 (1881), affirmed in *Chambers v. Harrington*, 111 U. S. 350, *ante*. An adverse claimant in a suit brought against an applicant for a patent may show that the location of the claim applied for is invalid, for the reason that the ground contained therein is embraced by a third claim, in which neither party has or claims an interest.

Eilers v. Boatman, 3, 159 (1881), affirmed in s. c. 111 U. S. 356. In an action on an adverse claim, an express finding that the applicant is in possession is not necessary to support a judgment in his favor, when the facts show that he has done all that the law requires to inaugurate a title to and hold a valid mining claim, has a right to the possession, and is constructively, if not actually, in possession.

LAND OFFICE DECISIONS.

Where adverse claimants claim none of the mining ground included in the application for a patent, but simply have a right to construct a drain, ditch, and flume through or across it, to their dumping ground,

No title to mining claims on the public lands acquired by location, occupancy, and working prior to 1866 was or is valid as against the United States or their grantees. As against the government such occupants were trespassers, and not being citizens, or having declared their intention to become such, had no right to be protected by the act of 1872.

Champion M. Co. v. Con. Wyoming G. M. Co., 75, 78 (1888).. Where the junction of two veins is unknown at the time the owner of one applies for a patent, the owner of the other is not concluded by the proceedings in the Land Department. He could have no standing as an adverse claimant.

Anthony v. Jillson, 83, 296 (1890). In an action under Rev. Stats. 2326, each party is an actor, and must establish his claim against the government as well as against his adversary. He must allege in his pleadings all the facts which are essential to the validity of his claim; as, the citizenship of the locators.

Quigley v. Gillett, 101, 462 (1894). In an action on an adverse claim, the court has nothing to do with the proceedings in the Land Office, and has no power to determine their regularity or irregularity, sufficiency or insufficiency.

Where an adverse claimant sets up a title based on a location subsequent to that of the applicant for patent, the burden is upon such claimant to prove that the applicant has forfeited his right by failure to perform the annual work.

McGinnis v. Egbert, 8, 41 (1884). Verdicts in actions **Colorado.** under Rev. Stats. 2326, as amended by act of March 3, 1881, should find which party, if either, is entitled to possession by virtue of a compliance with the statutes of the United States and of the State. A verdict merely for plaintiff or defendant is not good.

Rockwell v. Graham, 9, 36 (1885). A right of way for a flume to conduct water is an easement which is protected by the provisions of Rev. Stats. 2339-40, and is not ground for an adverse claim to land for which application has been made as a placer mining claim.

Lee v. Stahl, 9, 208 (1886). The effect of Rev. Stats. 2336 is to exclude a cross lode, except at the point of lode intersection, as not a subject of grant. It follows that the right to it is not lost by failure to adverse. But this does not include the space of lode intersection. If a prior locator would secure this, and other rights which he has by virtue of his prior location, he must adverse, and this whether his prior location was made under the act of 1866 or the act of 1872. It is true that Rev. Stats. 2344 provides that nothing contained in this chapter shall be construed to impair in any way rights or interests in mining property acquired under existing laws; but other sections of the act provide the mode and manner in which rights shall be asserted and secured by adversary proceedings, and a failure to assert prior rights is treated as a waiver.

The policy of the law is to require all rights and equities to the premises sought to be purchased and patented to be adjusted prior to the issuance of the patent, to the end that it may be impregnable against all comers.

Becker v. Pugh, 9, 589 (1886). Before either party can recover in

an action on an adverse claim, he must satisfy the requirements of the statutes, State and Federal, and local miners' rules and regulations in force relating to the location of mining claims. Title by occupancy merely does not satisfy the terms of the act. A requirement of miner's regulation that a claim be "staked off" means, it seems, that the boundaries, at least the course of the veins, be marked with stakes. It is not complied with by erecting one stake containing a notice. To support an adverse filed under Rev. Stats. 2326, an action in the nature of ejectment is proper. Some of the rules relating to ejectment are, however, modified in such causes. No proof of actual ouster is necessary, and an action may, upon proper showing, be maintained when plaintiff or when no one is in possession.

Bryan v. McCaig, 10, 309 (1887). Under act of Congress, March 3, 1881, the claimant in an adverse suit must establish his right by evidence of a compliance with the statutes relating to the location and holding of mining claims. Whether these requirements have been complied with is a question of fact for the jury. Evidence that annual labor has not been performed is admissible, though not pleaded specially.

Doherty v. Morris, 11, 12 (1887). In an action on an adverse claim, the fact that one of the original owners conspired with the person who relocated the property as an abandoned lode to make default on the assessment work, is immaterial, when as a matter of fact the work was not done. In such an action an original owner may not establish an equitable title in the relocation. In this proceeding he can only show title in himself as against the applicant for a patent.

Manning v. Strehlow, 11, 451 (1888). In an action on an adverse claim, the issue is whether either party is entitled to a patent. "To entitle a party to a judgment in his favor, it must appear that he has not only the right of possession, but that he has made a valid location of the premises in controversy, and, by virtue of a compliance with all the requirements of the mining law, is entitled to a patent from the government." An instruction that it is for the jury to determine who had possession and who had the right of possession at the commencement of the action is erroneous, and a verdict rendered thereunder that "the jury find the issues for the plaintiff that he was in possession . . . at the time of the commencement of this action, and is now entitled to possession thereof," is bad. In such an action the objection that plaintiff had parted with his interest to his wife is not sustained by proof of a deed of a lode of another name, which name many years before was applied to this lode or a part of it, the grantee testifying that she knew both claims, and that her deed did not cover any part of the lode in controversy.

Bushnell v. Croke M. & S. Co., 12, 247 (1888). In an action on an adverse claim a verdict in the following words is good: "We find the issue joined for the plaintiff, and that he is the owner of, and entitled to the possession of, the ground described in the complaint."

Marshall S. M. Co. v. Kirtley, 12, 410 (1888). The object of an action brought in support of an adverse claim being to determine the plaintiff's right of possession and title under such claim, it becomes a material question in the case whether the requirements of the statute

in relation to the filing of such claims have been complied with; and an allegation in defendant's answer that his right to a patent was not adversely by a claim under which plaintiff claims the right of possession to the premises in controversy, presents a defence as against such a claim.

An adverse claimant is not confined to such title to the premises in controversy as he had at the time the action was begun. He may be permitted to bring other adverse claims by supplemental complaint, if the same have been duly filed and brought within the time limited by law, although his rights thereunder were acquired after the action was begun.

Thomas v. Chisholm, 13, 105 (1889). In a proceeding on an adverse claim, a party basing his title upon a location by a corporation must allege and prove the organization of the corporation and the qualification of its members.

Hunt v. Eureka Gulch M. Co., 14, 451 (1890). Application for patent was made on October 26, and publication of notice begun on October 31, and continued to January 2 inclusive. Adverse claim was filed on January 1. This was too late, and suit thereon was dismissed. The adverse claim must be filed within sixty days, and the time is not extended by the fact that publication when made in a weekly paper must be for sixty-three days. An action begun on an adverse claim cannot be maintained as an ordinary action to quiet title when it appears that it will fail under Rev. Stats. 2326.

Keeler v. Trueman, 15, 143 (1890). Title to a mining claim is real estate, and descends to the heirs of the owner. Consequently where an administrator filed an adverse claim to an application for a patent, and began suit thereon, alleging a title by location in his decedent, a demurrer to the complaint was sustained on the ground that he was without interest. The rights of the decedent in the claim descended to his heirs.

An allegation of citizenship is absolutely necessary in an action on an adverse claim.

Seymour v. Fisher, 16, 188 (1891). It is the settled policy of the government that all controversies relating to conflicting mining claims be so far as possible adjudicated prior to patent. The method of so doing is provided by the statutes providing for adverse claims and proceedings thereon. If a prior claimant "does not avail himself of the proceedings thus provided for him, the superior advantages obtained by virtue of his priority of discovery and compliance with the location statutes may be lost. Failing to invoke the statutory remedy given, and permitting his adversary to secure a patent covering his location or a part thereof, he will be treated in law as having voluntarily waived his prior and superior rights."

Kannaugh v. Quartette M. Co., 16, 341 (1891). A party who files his adverse claim in due time, but afterwards allows the action thereon to be dismissed for failure to prosecute, stands in no more favorable position than if he had failed to file an adverse claim.

He cannot be permitted to show in an action to recover the property from him that the plaintiff (party applying for the patent) had not fully complied with the law.

People v. District Court, 19, 343 (1894). One who purchases a mining claim during the pendency of adverse suits thereon takes the property subject to the rights of the parties in litigation. It is not necessary that notice of a *lis pendens* should have been filed as required by Civil Code of 1887, sec. 277, which requires such notice of actions for the possession of real property.

Dakota. *Suessenbach v. First Nat. Bank*, 5, 477 (1889). The locators of a placer mining claim, having an understanding with adjoining locators by which they were to lay out a town on their claims, conveyed a lot in the city of Deadwood, being part of their claim, to a banker, who erected a banking house thereon. The grantees of the original locators, when they obtained a patent for the whole claim, held it subject to a trust in favor of the grantees of this lot to the extent of their conveyance. It was not the duty of the latter to file an adverse claim.

Idaho. *Rosenthal v. Ives*, 2, 244 (1887). In an action brought under Rev. Stats. 2326, and the act of 1881 amendatory thereof, in support of an adverse claim, it is necessary that one claimant should show a superior title as against the government, and a right to a patent to the claim in dispute, or a part thereof, before he is entitled to a verdict. In such an action the plaintiff must allege and show that he and the locator under whom he claims are, or have declared their intention to become, citizens.

Back v. Sierra Nev. Con. M. Co., 2, 386 (1888). A tunnel location is a mining claim within the meaning of Rev. Stats. 2326, and the locator may protect his rights therein by means of an adverse claim.¹

Cronin v. Bear Creek G. M. Co., 2, 1146 (1892). A complaint in an action on an adverse claim, under Rev. Stats. 2326, which fails to show that plaintiff has filed his adverse claim within the period prescribed by Rev. Stats. 2325, and brought the action within the time thereafter allowed by Rev. Stats. 2326, is defective. So also is such a complaint if it does not show wherein the location alleged to have been made by the defendant conflicts with that made by the plaintiff, or whether it conflicts at all. Without such allegation it would be impossible to construct a judgment which would determine the rights of the parties, or give the necessary information to the officers of the Land Department without going outside the complaint to the evidence.

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Plaintiff was not estopped by reason of failure to file an adverse claim.

Where the claimants, under a second application, having adverse the first and having brought suit in support of the adverse, prematurely enter the ground in conflict before either suit has been decided, and it is afterwards decided in their favor, the question is one solely between the government and the claimants, and the government may waive the irregularity. *Gunnison C. M. Co.*, 2 L. D. 722 (1884).

Parties who fail to adverse a pending application admit that they have no right to the ground embraced therein, and cannot afterwards be heard to set up either an equitable or legal title to the premises. *Wight v. Tabor*, 2 L. D. 738 (1884).

If the owner of the original or prior location neglects to adverse the application for a patent to the junior location, it must be assumed, under the provisions of Rev. Stats. 2325, that the claimant of such junior location is entitled to a patent as against the claimants of the prior location. All questions concerning the proper location and the proper maintenance of such prior location by the performance of the labor required by statute, ought to be, and necessarily must be, left to the courts for adjudication.

"If the applicant had complied with the law on the subject of the entry of lode claims, he was entitled to that portion of his lode unaffected by the judgment of the court, and of course had the right of entry, if the case was not appealed by either of the parties to such suit. He might, if he had desired so to do, have disclaimed in a proper way in the Land Office any claim to all that portion of the lode included in the adverse claim, waiving no right he may have in court. In such a case he would be entitled to take, on making satisfactory proof of the actual existence of the lode and other compliances with the law, that portion of his lode concerning which there was no controversy. If the judgment in favor of the adverse claimant was for all that he claimed, there was nothing for the adverse claimant to appeal from, and the applicants had the right to treat it as a final judgment; and the adverse claimant having secured all he claimed, had no right to object to the entry of the applicants for so much of the vein or lode as he declared, by his proceeding in court, that he did not claim. If, however, the judgment of the court was that the adverse claimant had the right only to a portion of the lode claimed by him, no entry could be made by the applicants including any portion of the lode claimed adversely, until such judgment should become final."

Where an application for patent is adverse, the applicant is at liberty to litigate with the adverse claimant, or relinquish the ground in conflict and take a patent for the remainder, or dismiss his application for patent and rely upon his possessory title. *Branagan v. Dulaney*, 2 L. D. 744 (1884).

Where application for patent was made for ground covered by a prior application, and the conflict was shown by the record in the first application, the second application should have been treated as an adverse claim. Although the second applicants did not file an adverse claim, being misled by the error of the register in receiving their application, they will now be allowed thirty days in which to institute suit. *Hall v. Street*, 3 L. D. 40 (1884).

Patent may issue upon the filing of a waiver of the adverse claim in

the local office without ascertaining whether the pending judicial proceedings on such claim have also been abandoned and the suit dismissed by the court. *St. Lawrence M. Co. v. Albion C. M. Co.*, 4 L. D. 117 (1885):

When application is made for patent for a placer mining claim embracing several locations, an adverse claimant may prove abandonment of any one of such locations by failure to make annual expenditure upon it, or upon a common claim for its benefit, and the possessory right will fail even though the adverse claimant may not show in himself a good adverse title by reason of a like failure. *Good Return M. Co.*, 4 L. D. 221 (1885).

J. applied for a patent for a placer claim. Subsequently M. applied for a patent for a lode claim, the surface of which conflicted with J.'s claim. J. filed an adverse claim, began suit, and then voluntarily dismissed the suit. This was held to be a sufficient waiver of claim to the entire width applied for to authorize the issue of a patent to the lode applicant, and an abandonment of so much of the alleged placer ground as conflicted with the lode claim. *Monroe Lode*, 4 L. D. 273 (1885).

Where judgment has been entered in an action on an adverse claim in favor of the applicant, he has not an absolute right to a patent as against the government. "The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. The sufficiency of that proof is a matter for the determination of the Land Department. It follows, therefore, that further hearing may, if deemed necessary, be ordered for the purpose of ascertaining with greater certainty the character of the land, or whether the conditions of the law have been complied with in good faith." *Alice Placer Mine*, 4 L. D. 314 (1886); *George H. Smith*, 7 L. D. 415 (1888); s. c. 10 L. D. 184 (1889).

A protestant is not entitled to the right of appeal. A co-owner objecting to the issue of patent in order to be heard in the Land Office must protect his rights under the form of procedure provided for an adverse claimant. *L. B. Hussey Lode*, 5 L. D. 93¹ (1886); *Monitor Lode*, 18 L. D. 358 (1894).

Where there is no surface conflict there can be no adverse claim. Questions as to the right to follow a vein on its dip must be adjudicated in the courts. *N. Y. Hill Co. v. Rocky Bar Co.*, 6 L. D. 318 (1886).

The withdrawal of a protest will not prevent action on the matters alleged therein, if it appears that the applicant has in fact failed to comply with the law. *American Flag Lode*, 6 L. D. 320 (1887).

An entry allowed while suit on an adverse claim is pending and undetermined should be cancelled, not merely suspended, and the parties placed *in statu quo*. *Meyer v. Hyman*, 7 L. D. 83 (1888).

A person protesting against the issuance of patent, who stands solely in the relation of *amicus curiæ*, and who alleges no interest in the result of the application, cannot question the judgment of the Land Office in passing upon the application and protest, and is not entitled

¹ See *Hunt v. Patchin*, 35 Fed. 816; *Turner v. Sawyer*, 150 U. S. 578; *Brundy v. Mayfield*, 15 Mont. 201.

to the right of appeal from such decision. And this is so, whether the mineral claimant has or has not complied with the terms of the statute; because, if the protestant claims no interest in the suit, the right of the mineral claimant will be considered solely as between the claimant and the government. But where a protestant shows possession of an interest, either present or prospective, depending on the final determination of a protest against the issuance of a patent to a mineral claimant, and shows that the claimant has failed to comply with the terms of the statute as to the posting and publication of notice of his claim and application for patent, or any other failure to comply with the terms of the statute whereby the limitation of the statute ought not to operate against the protestant, he is entitled to the right of appeal upon said protest, although no adverse claim was filed within the period prescribed by the statute.

The mineral claimant cannot ask the Department to say that the protestant is barred by failure to properly adverse within the limited time, unless he establishes the facts which cause the time to begin to run; and since that serious consequence results to the protestant upon proof of such facts, he has an interest and a right to show that the steps were not taken to set the statutory period of limitation in motion against him. To that extent he is involved, and only to that extent has he the right of appeal.

Therefore a protestant who alleges an interest adverse to a mining claimant, and further alleges a failure on the part of said claimant to comply with the mining laws, is not a mere friend of the court, but a protestant acting in his own interest, and asking the judgment of the Department on the question raised by his protest that the mineral claimant may be required to comply with the law and thus enable the protestant to assert his claim in the proper tribunal. A protestant of this character is entitled to the right of appeal. *Bright v. Elkhora M. Co.*, 8 L. D. 122 (1889); *Dotson v. Arnold*, 8 L. D. 439 (1889).

When it appears from protest filed during the period of publication that an adverse proceeding is pending in the courts, the local office should suspend action pending the final disposition of such proceeding, although it may have been instituted prior to the application for patent. The pendency of an adverse proceeding, instituted to determine the right of possession at the time when the application for patent is made, renders it unnecessary for the adverse claimant to commence another action after filing protest.

On the final determination of judicial proceedings patent may issue to the applicant for such portion of the claim as he shall appear, from the decision of the court, to rightly possess, if a vein or lode has been discovered therein. *Northwestern Lode & Mill Site Co.*, 8 L. D. 437 (1889).

All rights or interests adverse to the applicant will be held as adjudicated in his favor, if not asserted in the manner and within the period provided by the statute. *Petit v. Buffalo Co.*, 9 L. D. 563 (1889); *Gowdy v. Kismet G. M. Co.*, 22 L. D. 624 (1896).

The date of a location set up by an adverse claimant, and the competency of a corporation under State laws to make such location, are questions of title and properly matters for judicial determination.

A discrepancy between the adverse claim as filed and accepted in the local office and that upon which suit is instituted, will not warrant the Land Department in the resumption of proceedings during the pendency of the proceedings in court. *Bay State Co. v. Trevillion*, 10 L. D. 194 (1890).

During pendency of adverse proceedings duly initiated in court, a motion to dismiss the application for patent will not be entertained. The motion here was on the ground that the application was not verified as required by Rev. Stats. 2325. *Solitaire Co. v. Sigafus*, 10 L. D. 270 (1890); *Iron S. M. Co. v. Mike & Starr M. Co.*, 6 L. D. 538 (1888).

Where a protest by a prior applicant is filed against an entry based on relocation, and it is alleged by the protestant that the claim was not subject to relocation, a hearing may be had to determine the truth of such allegation, as well as the counter charge that the right of the protestant under his application had been finally excluded by adverse proceedings prior to said relocation. *Continental Co. v. Gage*, 10 L. D. 534 (1890).

Failure to prosecute an adverse claim or in other manner to assert a right against a known pending application is conclusive against the existence of such right.

A judgment rendered in an action of ejectment not instituted in accordance with the provisions of Rev. Stats. 2326 can in no way bind the Land Department or control its action, which must be based upon the record presented in the Department. *Nichols v. Becker*, 11 L. D. 8 (1890).

The local office has no authority to allow a mineral entry during the pendency of adverse judicial proceedings.

The failure of an agent who files an adverse claim, to furnish therewith proof in corroboration of his sworn statement of authority, will not defeat the right of the adverse claimant to have the controversy settled by judicial proceedings.

"While the Secretary of the Interior has the power to establish rules and regulations to give effect to the provisions of an act which have all the force and effect of law, if not in contravention of it, yet the failure to comply with the technical requirements of the rules and regulations was a mere irregularity, and will not defeat the right of the claimant to have the controversy settled by the appropriate tribunal, if he has complied with the statute. The material question is, whether the person filing the adverse claim was in fact the duly authorized agent of the persons for whom he purported to act." *Brown v. Bond*, 11 L. D. 150 (1890).

An adverse claim will be recognized as filed within time, if such filing is in accordance with the regulations then in force.

No action can be taken in the Land Department on an application during the pendency of adverse judicial proceedings. The relinquishment by the applicant of the land originally in conflict does not authorize the Land Department to reassume jurisdiction of the case, during the pendency of judicial proceedings by an adverse claimant who has been permitted in such proceedings to amend so as to embrace a larger quantity of land than was included in the original adverse claim. *Jamie Lee Lode v. Little Forepaugh Lode*, 11 L. D. 391 (1890).

A hearing should not be had before the local office on a protest against a mineral application during the pendency of adverse judicial proceedings. *Swaim v. Craven*, 12 L. D. 294 (1891).

A mineral entry made by an alien is not void, but voidable, and while of record, the land covered thereby is segregated from the public domain. A protestant who makes a mineral location on land thus segregated acquires no interest thereby, as against the government or the entryman, that will entitle him to be heard on appeal. *Leary v. Manuel*, 12 L. D. 345 (1891).

An adverse claim must be filed within the sixty days of publication, and in computing such period the first day of publication must be excluded. Where notice was published from October 19 to December 21, inclusive, an adverse claim filed on December 19 was too late. A misstatement in the published notice as to the termination of the period of publication will not excuse the adverse claimant from filing his claim within the statutory period. *Bonesell v. McNider*, 13 L. D. 286 (1891); *Ledger Lode*, 16 L. D. 101 (1893).

In computing the period within which an adverse claim must be filed, the first day of publication should be excluded. If the last day falls on Sunday or a legal holiday, the adverse claim may be filed on the next business day. It is not a valid reason for refusing to accept an adverse claim that proof of publication has not been received.

The statutory fee for filing and acting upon an adverse claim cannot be required of the adverse claimant in the event that his claim is rejected by the local office. An appeal will properly lie from the rejection of an adverse claim. *Waterhouse v. Scott*, 13 L. D. 718 (1891); *Ground Hog Lode v. Parole*, 8 L. D. 340 (1889).

The right to be heard on appeal from the Commissioner's decision may be properly accorded to a protestant against a mining claim who alleges an adverse interest and non-compliance with the law, and whose application for a hearing on said charge has been denied.

"In the protests before me I find specific charges of failure to make any discovery of rock in place bearing mineral, a specific denial of the expenditure of any money in development and improvement, and a charge that the testimony offered, and upon which the entry was allowed, was false and fraudulent, and a further charge that the land is not being entered for mining, but for other purposes; and for the purposes of this case, no hearing having been allowed, these charges stand uncontradicted. These allegations, if true, should cancel the entry." *Weinstein v. Granite Mountain M. Co.*, 14 L. D. 68 (1892).

One who files an adverse claim out of time, and subsequently brings suit thereon, but not within the statutory period, does not occupy the status of an adverse claimant, but that of a mere protestant without interest.

An adverse claim filed out of time, and subsequent judicial proceedings based thereon, but not begun within the period prescribed, do not preclude the allowance of a mineral entry; nor does the pendency of such proceedings bar the issuance of patent on such entry.

It may be contended that because the local officers in fact received the adverse claim, and suit has actually been brought in court, this Department has no authority to question its jurisdiction; but if the

claim is not filed as required, it is not filed at all in legal contemplation. *Nettie Lode v. Texas Lode*, 14 L. D. 180 (1892).

On the termination of judicial proceedings the local office should make the entry conform to the decree of the court, and the entry should not be allowed in the absence of the judgment roll. The said judgment cannot be attacked collaterally in this Department, so long as it is outstanding and in force, if the court which rendered it had jurisdiction. *Silver King Lode*, 14 L. D. 308 (1892).

A judgment that the adverse claimant is not entitled to possession is binding on the Department. *Wheeler v. Smith*, 23 L. D. 395 (1896).

Until the issue of patent, title to the public lands is in the government, and while it is so, the Land Department must, under the law, be the judge as to when, under what circumstances, and how the government shall part with title. The judgment of a court of competent jurisdiction upon an adverse claim is conclusive upon the parties, but only as to the right of possession. The party in whose favor judgment is rendered is entitled to patent only upon showing that he has complied with the requirements of the law, and a hearing may be ordered to ascertain this.

Applications for lode and placer claims having been filed for the same ground, and adverse claims being filed by both parties, the court found that the lodes existed in the placer claim and extended clear through that part in conflict with the lode claim, and rendered judgment that the placer claimants were entitled to patent for all the surface ground, and the lode claimants to the lodes or veins throughout their entire length. The Land Department refused a patent to the placer claimants for all the surface ground, but ordered a hearing to determine whether known lodes existed in the placer ground. *Apple Blossom Placer v. Cora Lee Lode*, 14 L. D. 641 (1892).

The failure of an adverse claimant, who is a purchaser, to furnish an abstract, will not defeat his right to be heard when he has done in good faith all that was in his power to comply with the rule. He had complied with the requirements of the statute, and the omission to comply with the rule was an irregularity and not a defect that vitiates the adverse claim. The Department has the same power that a court has to suspend its rules to avoid an act of injustice. *Hawkeye Placer v. Gray Eagle Placer*, 15 L. D. 45 (1892).

On a sufficient showing made by protest, the Department has authority after final entry to order a hearing to determine whether there has been due compliance with the mining law, although the adverse location, set up by the protestant, was not made until after the entry in question had been allowed. *Tam v. Storey*, 16 L. D. 282 (1893).

While protestants are barred from setting up any claim to the tract in question because they failed to file their adverse claim, still they have a right to show that the applicant has not complied with the law, and by so doing secure the cancellation of the entry, and thus make it necessary for the applicant to begin over again and give them an opportunity to file an adverse claim during the period of publication.

A protestant who alleges an adverse interest and non-compliance with the law by the applicant or his predecessors in title, is entitled, if

his application for a hearing has been denied, to be heard on appeal. *Nevada Lode*, 16 L. D. 532 (1893); *Gowdy v. Kismet G. M. Co.*, 22 L. D. 624 (1896); *Parsons v. Ellis*, 23 L. D. 69 (1896).

A mere protestant without interest is not entitled to appeal.

During the period covered by an owner holding a claim for cancellation, all intervening claims to the land are necessarily subject to such rights as might be finally accorded to the applicant, either on review or appeal. A relocation by a third party during that period would not give such an interest as to raise a right to be heard. *Smuggler M. Co. v. Trueworthy Lode Claim*, 19 L. D. 356 (1894).

If, pending application, the monuments marking the corners of the claim are destroyed by accident or design, the applicant will not be required to re-establish them. Nor is this ground for protest. *Bryne v. Stauson*, 20 L. D. 43 (1895).

The filing of a declaration in ejectment in New Mexico is a commencement of proceedings under Rev. Stats. 2326, even though summons on said declaration does not issue within the statutory period. *De Garcia v. Eaton*, 22 L. D. 16 (1896).

The obligation of an adverse claimant to begin judicial proceedings within the statutory period is not suspended by a motion to dismiss the adverse claim. *Scott v. Maloney*, 22 L. D. 274 (1896).

Where co-owners of an adverse claim bring separate suits in their individual names and in different courts, a dismissal of the junior proceeding will not confer jurisdiction upon the Department to proceed with the application and allow the entry. *Black Queen v. Excelsior No. 1*, 22 L. D. 343 (1896).

A suit pending on an adverse claim ousts the Department of all jurisdiction, even though it rests on an application which has been denied. *Clipper M. Co.*, 22 L. D. 527 (1896).

Where a mineral applicant institutes adverse judicial proceedings against a subsequent applicant whose claim involves in part the same land, they will act as a stay of proceedings in the Department. *Little Giant Lode*, 22 L. D. 629 (1896).

Where a court has assumed jurisdiction of an adverse proceeding, whether or not the proceeding has been commenced is for the court, and cannot be determined by the Department. *Cation v. Lewiston*, 23 L. D. 20 (1896).

Rev. Stats. 2325 only applies to suit between adverse mineral claimants, and not to contests as to character of land between agricultural and mineral claimants. *Powell v. Ferguson*, 23 L. D. 173 (1896).

The judgment of a court that neither party has shown title to the land precludes favorable action by the Department on the claim of the applicant. *Newman v. Barnes*, 23 L. D. 257 (1896).

Local officers are not required to transact business out of office hours, but if they do accept an adverse claim on the sixtieth day of publication after office hours, it will be treated as filed in time. *Giroux v. Scheurman*, 23 L. D. 546 (1896).

III. EFFECT OF THE PATENT.

The patent is the last step in the purchase of the claim from the United States. It is the conveyance by the government to its grantee, the instrument which is evidence of the grant, the perfected right in the patentee to the claim conveyed. It is, in addition to this, the judgment of a special tribunal, — the Land Department, — and as such is unassailable collaterally, when that tribunal has jurisdiction of the case, and as to matters properly determinable by it. The patent is then conclusive when brought to notice in a collateral proceeding. The act of the Department in issuing a patent is an adjudication of all matters necessarily included and determined by it, which are, that the lands described therein are mineral lands, that a discovery and location thereof have been made according to law, and that the necessary amount of work and all preliminary acts necessary to authorize the issuance of the patent have been performed, and that they are lode or placer claims, as the case may be. But it is not conclusive of the course of a lode.

The record of the Department cannot be used in an action at law to affect the validity of the patent. It is unassailable for errors of judgment.

When, upon an adverse claim filed, an action is brought, the jurisdiction of the Land Department is suspended until the controversy is decided by the court, and the court only can decide when the controversy is at an end. That question is out of the jurisdiction of the Department, as is also the title to the land. But it is the province of the Department to pass upon questions of fraud in the application, and consequently a patent may not be collaterally attacked for fraud in obtaining it. So questions of prior rights of occupancy which would be interfered with by the working of the mines are cognizable by the Land Department.

Not only the courts in a collateral proceeding, but the Land Department itself, have no power, when a patent has once issued, to vacate, recall, or limit it. That can only be accomplished in one way, as will be explained below.¹

If, on the other hand, the Land Department had no jurisdiction of the case, its action in issuing a patent is unauthorized, and the patent is void, and may be attacked in a collateral proceeding. A

¹ Div. IV., this chapter.

court of law may then consider matters disclosing a want of jurisdiction, it may read the patent in the light of existing laws and such facts as it should take judicial notice of, and may declare the Land Office to be without jurisdiction and the patent of no effect. Such jurisdiction is wanting where the government has no title to the land in question, as where it has passed out of the United States by previous grants, or where the issuance of the patent is unauthorized or prohibited by law, or, what is the same thing, the land has been reserved from sale. In such cases no title can pass. Like that of an individual, the government conveyance cannot pass title to ground that it does not own, or that its agent is without authority to convey. That want of authority must be a total want of authority, not a mere impropriety in its exercise, and every presumption is in favor of its existence.

When the Department's authority depends on the existence of particular facts, as, for instance, citizenship, or upon the performance of certain antecedent acts, it is the duty of the Department to ascertain the existence of these facts, or whether these acts have been performed, and its determination is conclusive against collateral attack.

The error of the Land Department, in cases within its jurisdiction, can, however, be corrected, but only at the instance of the government, which may have a patent vacated in equity for fraud or mistake in its issuance. The power of the Department itself over the land, ends when the patent is issued and placed on its records.

Although the patent is conclusive, yet, if the patentee was affected by a fiduciary relation, the courts will control the title for the benefit of the *cestui que trust*, and, if necessary, decree a conveyance. This will be done not only in the case of an express trust, where the trustee has taken title in his own name, but in all cases where a confidential relation exists. A co-tenant who surreptitiously obtains a patent in his own name, in disregard of the rights of other co-tenants, will be held to be a trustee.

Where, however, there existed a right and duty to file an adverse claim, the adverse party cannot, on failure to do so, set up a trust, unless he was induced not to contest the patentee's application by an agreement or by fraudulent conduct, such as would affect the patentee with a constructive trust.

In like manner the doctrine of estoppel cannot be set up

against one who claims under a patent, on the ground that he, by making no objection to the title of the adverse party, misled him as to his title, so that he made expenditures upon the land. There was a duty to file an adverse claim, from which he is not released by the patentee's conduct.

The patent passes title in fee clear of any incumbrances or restrictions imposed by State legislation, such as outstanding dower interests.

The patent being simply the evidence of the grant, when it has been issued, takes effect by relation as of the first initial step in the acquisition of the title, that is, the original location, at least so far as to cut off intervening rights, unless they be such that the patentee has lost the right to question them by reason of his failure to file adverse claims, as required by Rev. Stats. 2325. Where such rights exist, the relation is to the date of the issuance of the certificate of entry. The date of location may be stated in the instrument, or may appear in the record of the entry in the Department, and may be thus established, or it may be otherwise proven.

The right to a title once vested is equivalent to a title, and consequently when application, publication, and payment have been made, and a certificate of purchase issued to the applicant, this is equivalent to a patent, so far as third parties are concerned. The applicant then has the equitable title to the land, with all the rights and obligations of ownership; the United States hold the naked legal title in trust for him.

United States. *Morton v. Nebraska*, 21 Wall. 660 (1874). "Patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved; and this want of power may be proved by a defendant in an action at law."

Eureka Con. M. Co. v. Richmond M. Co., 4 Sawy. 302 (1877), C. C. D. Nev. Field, J.: "Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. If the date of such location be stated in the instrument, or appear from the record of its entry in the local land office, the patent will take effect by relation as of that date, so far as may be necessary to cut off all intervening claimants, unless the prior right of the patentee, by virtue of his earlier location, has been lost by a failure to contest the claim of the intervening claimant, as provided in the act of 1872. As in the

to the right of appeal from such decision. And this is so, whether the mineral claimant has or has not complied with the terms of the statute; because, if the protestant claims no interest in the suit, the right of the mineral claimant will be considered solely as between the claimant and the government. But where a protestant shows possession of an interest, either present or prospective, depending on the final determination of a protest against the issuance of a patent to a mineral claimant, and shows that the claimant has failed to comply with the terms of the statute as to the posting and publication of notice of his claim and application for patent, or any other failure to comply with the terms of the statute whereby the limitation of the statute ought not to operate against the protestant, he is entitled to the right of appeal upon said protest, although no adverse claim was filed within the period prescribed by the statute.

The mineral claimant cannot ask the Department to say that the protestant is barred by failure to properly adverse within the limited time, unless he establishes the facts which cause the time to begin to run; and since that serious consequence results to the protestant upon proof of such facts, he has an interest and a right to show that the steps were not taken to set the statutory period of limitation in motion against him. To that extent he is involved, and only to that extent has he the right of appeal.

Therefore a protestant who alleges an interest adverse to a mining claimant, and further alleges a failure on the part of said claimant to comply with the mining laws, is not a mere friend of the court, but a protestant acting in his own interest, and asking the judgment of the Department on the question raised by his protest that the mineral claimant may be required to comply with the law and thus enable the protestant to assert his claim in the proper tribunal. A protestant of this character is entitled to the right of appeal. *Bright v. Elkhorn M. Co.*, 8 L. D. 122 (1889); *Dotson v. Arnold*, 8 L. D. 439 (1889).

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A hearing should not be had before the local office on a protest against a mineral application during the pendency of adverse judicial proceedings. *Swaim v. Craven*, 12 L. D. 294 (1891).

A mineral entry made by an alien is not void, but voidable, and while of record, the land covered thereby is segregated from the public domain. A protestant who makes a mineral location on land thus segregated acquires no interest thereby, as against the government or the entryman, that will entitle him to be heard on appeal. *Leary v. Manuel*, 12 L. D. 345 (1891).

An adverse claim must be filed within the sixty days of publication, and in computing such period the first day of publication must be excluded. Where notice was published from October 19 to December 21, inclusive, an adverse claim filed on December 19 was too late. A misstatement in the published notice as to the termination of the period of publication will not excuse the adverse claimant from filing his claim within the statutory period. *Bonesell v. McNider*, 13 L. D. 286 (1891); *Ledger Lode*, 16 L. D. 101 (1893).

In computing the period within which an adverse claim must be filed, the first day of publication should be excluded. If the last day falls on Sunday or a legal holiday, the adverse claim may be filed on the next business day. It is not a valid reason for refusing to accept an adverse claim that proof of publication has not been received.

The statutory fee for filing and acting upon an adverse claim cannot be required of the adverse claimant in the event that his claim is rejected by the local office. An appeal will properly lie from the rejection of an adverse claim. *Waterhouse v. Scott*, 13 L. D. 718 (1891); *Ground Hog Lode v. Parole*, 8 L. D. 340 (1889).

The right to be heard on appeal from the Commissioner's decision may be properly accorded to a protestant against a mining claim who alleges an adverse interest and non-compliance with the law, and whose application for a hearing on said charge has been denied.

"In the protests before me I find specific charges of failure to make any discovery of rock in place bearing mineral, a specific denial of the expenditure of any money in development and improvement, and a charge that the testimony offered, and upon which the entry was allowed, was false and fraudulent, and a further charge that the land is not being entered for mining, but for other purposes; and for the purposes of this case, no hearing having been allowed, these charges stand uncontradicted. These allegations, if true, should cancel the entry." *Weinstein v. Granite Mountain M. Co.*, 14 L. D. 68 (1892).

One who files an adverse claim out of time, and subsequently brings suit thereon, but not within the statutory period, does not occupy the status of an adverse claimant, but that of a mere protestant without interest.

An adverse claim filed out of time, and subsequent judicial proceedings based thereon, but not begun within the period prescribed, do not preclude the allowance of a mineral entry; nor does the pendency of such proceedings bar the issuance of patent on such entry.

It may be contended that because the local officers in fact received the adverse claim, and suit has actually been brought in court, this Department has no authority to question its jurisdiction; but if the

claim is not filed as required, it is not filed at all in legal contemplation. *Nettie Lode v. Texas Lode*, 14 L. D. 180 (1892).

On the termination of judicial proceedings the local office should make the entry conform to the decree of the court, and the entry should not be allowed in the absence of the judgment roll. The said judgment cannot be attacked collaterally in this Department, so long as it is outstanding and in force, if the court which rendered it had jurisdiction. *Silver King Lode*, 14 L. D. 308 (1892).

A judgment that the adverse claimant is not entitled to possession is binding on the Department. *Wheeler v. Smith*, 23 L. D. 395 (1896).

Until the issue of patent, title to the public lands is in the government, and while it is so, the Land Department must, under the law, be the judge as to when, under what circumstances, and how the government shall part with title. The judgment of a court of competent jurisdiction upon an adverse claim is conclusive upon the parties, but only as to the right of possession. The party in whose favor judgment is rendered is entitled to patent only upon showing that he has complied with the requirements of the law, and a hearing may be ordered to ascertain this.

Applications for lode and placer claims having been filed for the same ground, and adverse claims being filed by both parties, the court found that the lodes existed in the placer claim and extended clear through that part in conflict with the lode claim, and rendered judgment that the placer claimants were entitled to patent for all the surface ground, and the lode claimants to the lodes or veins throughout their entire length. The Land Department refused a patent to the placer claimants for all the surface ground, but ordered a hearing to determine whether known lodes existed in the placer ground. *Apple Blossom Placer v. Cora Lee Lode*, 14 L. D. 641 (1892).

The failure of an adverse claimant, who is a purchaser, to furnish an abstract, will not defeat his right to be heard when he has done in good faith all that was in his power to comply with the rule. He had complied with the requirements of the statute, and the omission to comply with the rule was an irregularity and not a defect that vitiates the adverse claim. The Department has the same power that a court has to suspend its rules to avoid an act of injustice. *Hawkeye Placer v. Gray Eagle Placer*, 15 L. D. 45 (1892).

On a sufficient showing made by protest, the Department has authority after final entry to order a hearing to determine whether there has been due compliance with the mining law, although the adverse location, set up by the protestant, was not made until after the entry in question had been allowed. *Tam v. Storey*, 16 L. D. 282 (1893).

While protestants are barred from setting up any claim to the tract in question because they failed to file their adverse claim, still they have a right to show that the applicant has not complied with the law, and by so doing secure the cancellation of the entry, and thus make it necessary for the applicant to begin over again and give them an opportunity to file an adverse claim during the period of publication.

A protestant who alleges an adverse interest and non-compliance with the law by the applicant or his predecessors in title, is entitled, if

his application for a hearing has been denied, to be heard on appeal. *Nevada Lode*, 16 L. D. 532 (1893); *Gowdy v. Kismet G. M. Co.*, 22 L. D. 624 (1896); *Parsons v. Ellis*, 23 L. D. 69 (1896).

A mere protestant without interest is not entitled to appeal.

During the period covered by an owner holding a claim for cancellation, all intervening claims to the land are necessarily subject to such rights as might be finally accorded to the applicant, either on review or appeal. A relocation by a third party during that period would not give such an interest as to raise a right to be heard. *Smuggler M. Co. v. Trueworthy Lode Claim*, 19 L. D. 356 (1894).

If, pending application, the monuments marking the corners of the claim are destroyed by accident or design, the applicant will not be required to re-establish them. Nor is this ground for protest. *Bryne v. Stauson*, 20 L. D. 43 (1895).

The filing of a declaration in ejectment in New Mexico is a commencement of proceedings under Rev. Stats. 2326, even though summons on said declaration does not issue within the statutory period. *De Garcia v. Eaton*, 22 L. D. 16 (1896).

The obligation of an adverse claimant to begin judicial proceedings within the statutory period is not suspended by a motion to dismiss the adverse claim. *Scott v. Maloney*, 22 L. D. 274 (1896).

Where co-owners of an adverse claim bring separate suits in their individual names and in different courts, a dismissal of the junior proceeding will not confer jurisdiction upon the Department to proceed with the application and allow the entry. *Black Queen v. Excelsior No. 1*, 22 L. D. 343 (1896).

A suit pending on an adverse claim ousts the Department of all jurisdiction, even though it rests on an application which has been denied. *Clipper M. Co.*, 22 L. D. 527 (1896).

Where a mineral applicant institutes adverse judicial proceedings against a subsequent applicant whose claim involves in part the same land, they will act as a stay of proceedings in the Department. *Little Giant Lode*, 22 L. D. 629 (1896).

Where a court has assumed jurisdiction of an adverse proceeding, whether or not the proceeding has been commenced is for the court, and cannot be determined by the Department. *Cation v. Lewiston*, 23 L. D. 20 (1896).

Rev. Stats. 2325 only applies to suit between adverse mineral claimants, and not to contests as to character of land between agricultural and mineral claimants. *Powell v. Ferguson*, 23 L. D. 173 (1896).

The judgment of a court that neither party has shown title to the land precludes favorable action by the Department on the claim of the applicant. *Newman v. Barnes*, 23 L. D. 257 (1896).

Local officers are not required to transact business out of office hours, but if they do accept an adverse claim on the sixtieth day of publication after office hours, it will be treated as filed in time. *Giroux v. Scheurman*, 23 L. D. 546 (1896).

III. EFFECT OF THE PATENT.

The patent is the last step in the purchase of the claim from the United States. It is the conveyance by the government to its grantee, the instrument which is evidence of the grant, the perfected right in the patentee to the claim conveyed. It is, in addition to this, the judgment of a special tribunal,—the Land Department,—and as such is unassailable collaterally, when that tribunal has jurisdiction of the case, and as to matters properly determinable by it. The patent is then conclusive when brought to notice in a collateral proceeding. The act of the Department in issuing a patent is an adjudication of all matters necessarily included and determined by it, which are, that the lands described therein are mineral lands, that a discovery and location thereof have been made according to law, and that the necessary amount of work and all preliminary acts necessary to authorize the issuance of the patent have been performed, and that they are lode or placer claims, as the case may be. But it is not conclusive of the course of a lode.

The record of the Department cannot be used in an action at law to affect the validity of the patent. It is unassailable for errors of judgment.

When, upon an adverse claim filed, an action is brought, the jurisdiction of the Land Department is suspended until the controversy is decided by the court, and the court only can decide when the controversy is at an end. That question is out of the jurisdiction of the Department, as is also the title to the land. But it is the province of the Department to pass upon questions of fraud in the application, and consequently a patent may not be collaterally attacked for fraud in obtaining it. So questions of prior rights of occupancy which would be interfered with by the working of the mines are cognizable by the Land Department.

Not only the courts in a collateral proceeding, but the Land Department itself, have no power, when a patent has once issued, to vacate, recall, or limit it. That can only be accomplished in one way, as will be explained below.¹

If, on the other hand, the Land Department had no jurisdiction of the case, its action in issuing a patent is unauthorized, and the patent is void, and may be attacked in a collateral proceeding. A

¹ Div. IV., this chapter.

court of law may then consider matters disclosing a want of jurisdiction, it may read the patent in the light of existing laws and such facts as it should take judicial notice of, and may declare the Land Office to be without jurisdiction and the patent of no effect. Such jurisdiction is wanting where the government has no title to the land in question, as where it has passed out of the United States by previous grants, or where the issuance of the patent is unauthorized or prohibited by law, or, what is the same thing, the land has been reserved from sale. In such cases no title can pass. Like that of an individual, the government conveyance cannot pass title to ground that it does not own, or that its agent is without authority to convey. That want of authority must be a total want of authority, not a mere impropriety in its exercise, and every presumption is in favor of its existence.

When the Department's authority depends on the existence of particular facts, as, for instance, citizenship, or upon the performance of certain antecedent acts, it is the duty of the Department to ascertain the existence of these facts, or whether these acts have been performed, and its determination is conclusive against collateral attack.

The error of the Land Department, in cases within its jurisdiction, can, however, be corrected, but only at the instance of the government, which may have a patent vacated in equity for fraud or mistake in its issuance. The power of the Department itself over the land, ends when the patent is issued and placed on its records.

Although the patent is conclusive, yet, if the patentee was affected by a fiduciary relation, the courts will control the title for the benefit of the *cestui que trust*, and, if necessary, decree a conveyance. This will be done not only in the case of an express trust, where the trustee has taken title in his own name, but in all cases where a confidential relation exists. A co-tenant who surreptitiously obtains a patent in his own name, in disregard of the rights of other co-tenants, will be held to be a trustee.

Where, however, there existed a right and duty to file an adverse claim, the adverse party cannot, on failure to do so, set up a trust, unless he was induced not to contest the patentee's application by an agreement or by fraudulent conduct, such as would affect the patentee with a constructive trust.

In like manner the doctrine of estoppel cannot be set up

against one who claims under a patent, on the ground that he, by making no objection to the title of the adverse party, misled him as to his title, so that he made expenditures upon the land. There was a duty to file an adverse claim, from which he is not released by the patentee's conduct.

The patent passes title in fee clear of any incumbrances or restrictions imposed by State legislation, such as outstanding dower interests.

The patent being simply the evidence of the grant, when it has been issued, takes effect by relation as of the first initial step in the acquisition of the title, that is, the original location, at least so far as to cut off intervening rights, unless they be such that the patentee has lost the right to question them by reason of his failure to file adverse claims, as required by Rev. Stats. 2325. Where such rights exist, the relation is to the date of the issuance of the certificate of entry. The date of location may be stated in the instrument, or may appear in the record of the entry in the Department, and may be thus established, or it may be otherwise proven.

The right to a title once vested is equivalent to a title, and consequently when application, publication, and payment have been made, and a certificate of purchase issued to the applicant, this is equivalent to a patent, so far as third parties are concerned. The applicant then has the equitable title to the land, with all the rights and obligations of ownership; the United States hold the naked legal title in trust for him.

United States. Morton v. Nebraska, 21 Wall. 660 (1874). "Patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved; and this want of power may be proved by a defendant in an action at law."

Eureka Con. M. Co. v. Richmond M. Co., 4 Sawy. 302 (1877), C. C. D. Nev. Field, J.: "Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. If the date of such location be stated in the instrument, or appear from the record of its entry in the local land office, the patent will take effect by relation as of that date, so far as may be necessary to cut off all intervening claimants, unless the prior right of the patentee, by virtue of his earlier location, has been lost by a failure to contest the claim of the intervening claimant, as provided in the act of 1872. As in the

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system established for the alienation of the public lands, the patent is the consummation of a series of acts having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants to the same property."

"But this principle has been qualified in its application to patents of mining ground by provisions in the act of 1872 for the settlement of adverse claims before the issue of the patent. Under that act, when one is seeking a patent for his mining location, and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so far as to cut off intervening claimants, if any there can be, deriving title from other sources, such perhaps as might arise from a subsequent location of school warrants or a subsequent purchase from the State, as in the case of *Heydenfeldt v. Daney Gold Mining Co.*, reported in the third of Otto, the doctrine cannot be applied so as to cut off the rights of the earlier patentee under a later location, where no opposition to that location was made under the statute. The silence of the first locator is, under the statute, a waiver of his priority."

"The presumption of the law is that the officers of the executive department, specially charged with the supervision of the applications for mining patents, did their duty, and in an action of ejectment mere surmises to the contrary will not be listened to. . . . A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is iron clad against all mere speculative inferences."

St. Louis Smelting & Refining Co. v. Kemp, 104, 636 (1881). The St. Louis Company brought ejectment against K., and claimed title by virtue of a placer patent from the United States from date of March 29, 1879, embracing 164.60 acres. The defendant had judgment, and upon review it was held that there was error in admitting the record of the proceedings of the Land Office to impeach the validity of the patent.

Field, J.: "The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That these provisions may be properly carried out, a Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of

fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only value, as a means of quieting its possessor in the enjoyment of the land it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department, and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereunto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence. *Moore v. Wilkinson*, 13 Cal. 478; *Beard v. Federy*, 3 Wall. 478, 492.

“Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the Department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of the subject upon which it was competent to act.” “The doctrine declared in these cases as to the presumptions attending a patent has been uniformly followed by this court. The exceptions mentioned have also been regarded as sound, although from the general language used some of them may require explanation to understand fully their import. If the patent, according to the doctrine, be absolutely void on its face, it may be collaterally impeached in a court

of law. It is seldom, however, that the recital of a patent will nullify its granting clause, as, for instance, that the land which it purports to convey is reserved from sale. Of course, should such inconsistency appear, the grant would fail. Something more, however, than an apparent contradiction in its terms is meant when we speak of a patent being void upon its face. It is meant that the patent is seen to be invalid, either when read in the light of existing law, or by reason of what the court must take judicial notice of; as, for instance, that the land is reserved by statute from sale, or otherwise appropriated, or that the patent is for an unauthorized amount, or is executed by officers who are not intrusted by law with the power to issue grants of portions of the public domain.

"So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification that, when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the Land Department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack as is its determination upon any other matter properly submitted to its decision."

"The general doctrine declared may be stated in a different form, thus: A patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if, in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed."

"On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the Department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the Department upon matters properly before it is not assailed, nor is the regularity of the proceedings called into question; but its authority to act at all is denied, and shown never to have existed.

"According to the doctrine thus expressed and the cases cited in its support, — and there are none in conflict with it, — there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the Department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be

heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. *Boggs v. Merced Mining Co.*, 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can on its own account authorize proceedings to vacate the patent or limit its operation.

"This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee, often recognized by this court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date so far as it is necessary to cut off intervening adverse claims. Thus, in a contest between two patentees for the same land, it may be shown that a junior patent was founded upon an earlier entry than an older patent, and therefore passes the title. Such evidence in no way trenches upon the ruling of the Department upon matters pending before it. Nor is the doctrine of the conclusiveness of the patent inconsistent with the right of a party resisting it to show, if an entry is not stated in the instrument, that no entry of the land was made as an initiatory proceeding, where a statute, as was the case in North Carolina, mentioned in *Polk's Lessee v. Wendell*, declares that proceedings for the title, when such entry has not been made, shall be adjudged invalid. A statute may in any case require proof of a fact which otherwise would be presumed. Except with reference to such anterior matters and others of like character, no one in a court of law can go behind the patent and call in question the validity of the proceedings upon which it is founded."

Steel v. Smelting Co., 106, 447 (1882). Mineral lands belonging to the United States, although lying within a town site on the public domain, are subject to location and sale for mining purposes, and a title to them is acquired in the same manner as lands of that description which are elsewhere situated.

In ejectment for mineral land by a party claiming under the patentee, the defendant asserted that he owned the demanded premises by "superiority of possessory title and priority of actual possession" of them as part of a town site; that the patentee was not a citizen; and that fraud, bribery, and subornation of perjury had been used to obtain the patent. *Held*, that it was the province of the Land Department to pass upon such matters before the patent was issued, and that they could not be set up to defeat the action.

In this action, the Land Department having had jurisdiction, the patent was conclusive. It could not be attacked for fraud in this proceeding. "It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued, and placed on the records of the Department. This can be accomplished only by regular judicial proceedings taken in the name of the government for that special purpose." *Smelting Co. v. Kemp* followed.

It was further set up that plaintiff had lived in Leadville for nineteen years previous to his patent, and that he and his grantors knew of the occupancy and improvement of the land in question by defendants, and kept fraudulently quiet, making no claim of title, while defendants made large expenditures under the claim that the land was part of a town site, and that no mining was done on the land or notice given of its mineral character; and that after defendants discovered notice of the patent, they were assured that they would not be disturbed, that only a nominal sum, not exceeding \$25 a lot, would be demanded of them, and on the faith of these assurances they continued to make improvements. "The principle invoked is that one should be estopped from asserting a right to property, upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title, or with the fact that he had none. It will not be pretended that the defendants did not understand all about the title to the land; they knew that it was vested in the United States. And we must presume that the patentee gave notice of his purpose to acquire it, — such as the law required." Field, J.

Santa Clara M. Ass'n v. Quicksilver M. Co., 17 Fed. 657 (1882), C. C. D. Cal. The holder of a Mexican grant containing a quicksilver mine conveyed the mine, together with one thousand acres of land surrounding the mine, to A., who went into possession, and he and his grantees continued in possession, working the mine, for twenty-five years. After such conveyance, the holder of the grant executed a second conveyance to B., also embracing the mine and the land before conveyed to A. The grantees of B. presented the grant for confirmation and it was duly confirmed, and a patent in due form was issued to them. *Held*, that the legal title derived under the patent would be controlled for the benefit of the grantees of A., who held the better title under the first conveyance.

Pacific Coast M. & M. Co. v. Spargo, 16 Fed. 348 (1883), C. C. D. Cal. A patent when issued relates to and takes effect from the date of entry, when it is issued in pursuance of a certificate issued upon entry and payment. Where a patent to public land reserves the right of a proprietor of a mining vein or lode to extract and remove his ore therefrom, should it be found to penetrate or intersect the lands granted by the patent, the reservation refers only to parties who are proprietors at the time when the right of the patentee attaches to the land, or the date of the entry.

Cowell v. Lammers, 21 Fed. 200 (1884), C. C. D. Cal. On June 27, 1867, under the acts of Congress of June 1, 1862, and July 2, 1864,

a patent, regular on its face, was issued for the N. E. quarter of section 17, township 9, range 9 E., Mt. Diablo base and meridian, to the Central Pacific Railroad Company, to aid in the construction of its road. The patent expressly excepted all mineral lands, should any be found within the tract conveyed, but there was nothing to indicate that any part of such land was mineral land. In 1873 the company conveyed the land to M., who entered into possession and cultivated and used the land. In 1881 L. entered upon a part of the land against the will of C., and, claiming that it was mineral land, took up a mining claim thereon. Held, that L. could not, by this unlawful intrusion, initiate a right to a mining claim, and that the patent was conclusive when collaterally called in question; following *Atherton v. Fowler*, 96 U. S. 513; *Steel v. Smelting Co.*, 106 U. S. 447.

Deffeback v. Hawke, 115, 392 (1885). When a patent has issued for mining ground, no adverse claim having been filed, it relates to the inception of the patentee's right. A certificate of purchase passes the right of the government to the applicant, and as against the acquisition of title by any other party is equivalent to a patent. The land ceases to be subject to sale by the government. It has no longer any property therein, but holds the legal title only, in trust for the holder of the certificate.

Sparks v. Pierce, 115, 408 (1885). "Mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, and consequently not against any purchaser from them. To entitle a party to relief against the patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied to him."

"A person who makes improvements upon public land, knowing that he has no title, and that the land is open to exploration and sale for its minerals, and makes no efforts to secure the title to it as such land under the laws of Congress, or a right of possession under the local customs and rules of miners, has no claim to compensation for his improvements as an adverse holder in good faith, when such sale is made to another and the title is passed to him by a patent of the United States."

McEvoy v. Hyman, 25 Fed. 539 (1885), C. C. D. Colo. A suit in the Circuit Court, under Rev. Stats. 2326, on an adverse claim to a lode mining claim was dismissed by the clerk by order of an attorney claiming to represent the plaintiff, but was subsequently reinstated on the ground that it was dismissed without authority. After such dismissal, and before reinstatement, defendant renewed his application in the Land Office, and was allowed to enter his claim and receive a certificate therefor. Such certificate cannot have the effect of terminating the suit in the court.

Hallett, J.: "No doubt is entertained as to the general rule on which the defendant relies, that in actions at law a certificate of entry,

like a patent, is conclusive of the title. . . . In this case, however, and when considered with reference to the time and circumstances attending its issuance, the certificate of entry on which defendant relies cannot be of such weight, because the suit is directed to the very matter which is said to be concluded by the certificate of entry, and the officers of the Land Department had not jurisdiction of the controversy between the parties. The statute is that upon filing an adverse claim in the Land Office, and suit begun in support thereof, all proceeding in respect to the original application shall be stayed 'until the controversy shall be settled or decided by a court of competent jurisdiction, or the adverse claim waived.' Sec. 2326, Rev. Stats.

"By this suit the controversy between these parties in respect to these conflicting locations was transferred from the Land Office to this court, with the necessary result to divest the former tribunal of all jurisdiction until the court, proceeding in its own way, and by the recognized methods of the law, shall decide the matter in issue between the parties. And while the controversy is pending here, it cannot be affected by any action of the Land Department. . . . The court alone will decide when the controversy is at an end, and until such decision all things done in the Land Office must be ignored."

Hamilton v. Southern Nev. G. & S. M. Co., 33 Fed. 562 (1887), C. C. D. Nev. An application having been made for a patent, the sixty days for publication having expired, the applicant having paid for the land and a certificate of purchase having issued, objection will not be heard from third parties who failed to file adverse claims as required by the statute. The proceeding is absolutely conclusive as to them; it is in the nature of a proceeding *in rem*, and, so far as any unrepresented adverse claim is concerned, is binding on all the world. The applicant is then owner of the land. The United States have ceased to have any pecuniary interest in it, and hold the naked legal title for the certificate holder.

Aurora Hill Con. M. Co. v. 85 M. Co., 34 Fed. 515 (1888), C. C. D. Nev. An entry and certificate of purchase, so long as they remain uncanceled, are equivalent to a patent, so far as the rights of third parties are concerned.

Dahl v. Raunheim, 182, 260 (1889). When a person applies for a placer patent in the manner prescribed by law, and all the proceedings which are required by the statutes of the United States have been had, and no adverse claims are filed or set up, and it appears that the ground has been surveyed and returned by the surveyor-general to the local land office as mineral land, the question whether it is placer ground is conclusively established, and is not open to litigation by private parties seeking to avoid the effect of the proceedings. An applicant for a placer patent who has complied with all the proceedings essential for the issue of a patent for his location, but whose patent has not issued, may maintain an action to quiet title to a portion of the placer location claimed by another under a subsequent location of a lode claim.

Ducie v. Ford, 138, 587 (1891). Both parties had located and claimed a certain lode claim. Defendant was about to apply for a patent, and plaintiff was preparing to contest the application, when it was orally agreed that the latter should relinquish to the former such possession

as he had in consideration of the defendant's purchasing the land on their joint account. Defendant took out patent in his own name. In an action to have him decreed a trustee for plaintiff as to one-half, it was *held* that the withdrawal by plaintiff was not such a part performance as would take the contract out of the Statute of Frauds.

"If, in fact, plaintiffs had been in the exclusive possession of the lode in question, and defendant had never been in possession or exercised acts of ownership until the bargain was made between them, and the plaintiffs had surrendered possession in pursuance of the contract, it would have been easy to set forth such facts in unequivocal terms, and not have left them to be inferred from the ambiguous averments of this complaint."

Benson M. Co. v. Alta M. Co., 145, 428 (1892). "It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or in other cases all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership."

"The right to a patent once vested is treated by the government when dealing with the public lands as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants."

Turner v. Sawyer, 150, 578 (1893). A co-tenant who proceeds surreptitiously to obtain a patent in disregard of the rights of his co-tenants holds the title thus acquired in trust for the true owners. A bill in equity will lie to enforce such a trust. Co-owners are not obliged to file adverse claims.

Northern Pacific Ry. Co. v. Cannon, 54 Fed. 252 (1893), C. C. Ap., 9th Circ. The mineral patents could not be attacked by appellant on the ground that no mine was ever discovered on the land, and that they had been obtained by fraud committed on the officers of the government. This question can only be determined in a controversy between the United States and the defendants.

Lakin v. Roberts, 54 Fed. 461 (1893), C. C. App., 9th Circ., affirming s. c. 53 Fed. 338. Under Rev. Stats. 2320 a patent cannot be issued for a claim exceeding six hundred feet in width, although the original location was wider, and was made under the law of 1866, by which the width of claims was regulated by the customs of miners. Where a patent is issued for the full width of such claim, it is void as to the excess, and Rev. Stats. 2328 cannot be construed to preserve a right to the full width located and covered by the patent.

Doe v. Waterloo M. Co., 54 Fed. 935 (1893), C. C. S. D. Cal. Where the end lines as fixed and declared in the patent are parallel, the patentee's right to follow the dip beyond his side lines cannot be

defeated by showing that in the original location of the claim the end lines were not parallel. The patent is conclusive on this point.

Last Chance Min. Co. v. Tyler Min. Co., 61 Fed. 557 (1894), C. C. Ap., 9th Circ. "When a patent is issued for a mining claim, it relates back to the time when a valid location was first made, if it has been regularly kept up, and the date of such location, if the question of priority is raised, must, in the very nature of things, be determined by proof independent of the statute, unless the patent itself fixes the date. It does not depend upon the question as to which party made the first application for a patent or which obtained a patent first. It is true that the patent is conclusive of the fact that, at the time the application therefor was made, the applicant had a valid location, and had, in all respects, fully complied with the requirements of the mining laws; but it does not fix the time when the location was made. In order to determine this question it is necessary to introduce evidence independent of the patent."

"The right to a patent once vested is equivalent, so far as the United States government is concerned, to a patent issued. When issued, the patent relates back to the inception of the right of the patentee. But where it is sought to make a patent relate back of the date when the application for the patent was made, and attach itself to some prior right, the facts showing such prior right must be established by proof."

Cons. Wyoming Gold Min. Co. v. Champion Min. Co., 63 Fed. 540 (1894), C. C. N. D. Cal. A patent which conveys a lode, and independently and clearly marks it out, is not conclusive of the locality and course of the lode, if the owner of the claim asserts the right to follow a vein under land of another: he must prove that the apex thereof is within the lines of his own claim. The court cannot presume that the Land Office determined the course of the lode, and the marking of an ideal line across a survey and diagram did not have the effect of putting the lode into the ground, if there was none there.

Black v. Elkhorn M. Co., 163, 445 (1896). See this case on page 323, *ante*.

O'Connor v. Irvine, 74, 435 (1887). Where one who holds a mining claim as a resulting trustee for another, procures a patent in his own name, a court of equity will control the title in favor of the *cestui que trust*.

Mitchell v. Cline, 84, 409 (1890). Whatever may have been the prior rights or equities of one of several mining locators to whom a patent has been issued, they are surrendered by permitting and joining in the location upon which the patent is issued. The patent is conclusive against his devisees, that the location was valid and made upon unappropriated mineral land.

Poire v. Wells, 6, 406 (1882). Upon the issuance of a patent for mineral lands the presumption obtains that all the requirements preliminary to its issue have been complied with. This presumption is not open to rebuttal in an action at law, and the patent is unassailable except by a direct proceeding in equity for its correction or amendment. This doctrine, however, does not apply where the Land Department has no jurisdiction to act, or where the patent is void on its face, in which case its validity may be collaterally questioned.

In an action to recover possession in which plaintiff relied on a patent of the ground as mining ground, the patent could not be attacked on the ground that it had been obtained by fraud or that the ground was not mineral ground. This was a question of fact cognizable by the Land Department. Land embraced within a town site on the public domain, when occupied, is not exempt from location and sale for mining purposes. Whether there are prior rights of occupancy which would be interfered with by the working of such mines is a matter properly cognizable by the Land Department.

Cullacott v. Cash G. & S. M. Co., 8, 179 (1884). It is only after the entire description in the patent has been considered and found so inaccurate as to render the identity of the grant wholly uncertain that the grant is to be held void.

Seymour v. Fisher, 16, 188 (1891). If by reason of the fraudulent conduct of the patentee a would-be contestant is kept in ignorance of the pending of proceedings for a patent, and is thus prevented from availing himself of the statutory remedy, a court of equity will interfere and control the title in his favor by treating the patentee as a trustee for the prior locator whom he has defrauded. The purpose of this is not to attack or annul the patent; the conclusiveness of that instrument to convey the legal title is accepted. The object of the equitable interference is to give the benefit of the patent to the proper party, — the party who in equity is entitled to the premises.

F. and M. owned the "A" claim; B. owned the "Little Tiger," which conflicted therewith. F. and S. owned an adjoining claim, "G." S. entered into a contract with B., by which he was to patent the "Little Tiger" in his own name and then convey half to B. S. filed an amended location certificate, changing the name to "Tiger," and extending the boundaries to take in a large additional part of claim "A," and then having obtained a patent conveyed half to B. F. and M., in a suit against S., sought unsuccessfully to have him declared a trustee for them.

1st. The law allows a change of boundaries when amended certificates are filed, and an injury to superior rights thereby is effectually waived by failure to adverse.

2d. The fact that S. was co-owner with F. of claim "G" did not establish a fiduciary relation as to claim "A."

3d. The change of the name to "Tiger" was not of itself excuse for plaintiff's ignorance, the claim being generally known and spoken of as the "Tiger," and there being no other defect in the description of the property and no inadequacy in the posted and published notices.

As to the half conveyed to B., there was an express trust in B.'s favor arising from the agreement with S.

Justice M. Co. v. Lee, 21, 260 (1895), reversing s. c. 2 Ap. 112. "While it is true that the mineral lands of the government are open to location and purchase only by a citizen of the United States, or one who has declared his intention to become such, and the fact of alienage, if raised at the proper time by any one adversely interested, will defeat the acquirement of title thereto, yet the qualifications of an applicant for a patent, as well as the fact of discovery and the compliance on his part with other requirements made essential by the act

of Congress to entitle him to purchase the mineral land of the government, being cognizable by the officers of the Land Department, when in the exercise of their jurisdiction they approve the application and allow an entry, the fact of citizenship, as well as all other questions of fact, is presumed to have been established, and is not open to review by the courts at the instance of third parties." Goddard, J.

Girard v. Carson, 22, 345 (1896). A location to be valid must be made upon unappropriated lands of the United States. Where application is made for a patent to a claim which includes within its limits the original discovery shaft of a prior location, the owner of the latter, if he fails to file an adverse claim and to prosecute the same, loses not only the territory in conflict, but all right based upon such location. He is in the same position as if he had filed and prosecuted adverse proceedings which were determined adversely to him.

Meyendorf v. Frohner, 3, 282 (1879). Where fraud has been practised in procuring a patent from the United States, only the United States can attack such patent. A party must show himself entitled to a patent upon his equitable title before he can have another, who has secured a patented title by alleged fraudulent means, adjudged a trustee of such title for his use.

Talbott v. King, 6, 76 (1886). (For statement of facts, see under Chap. XVI., Div. I.) The validity of the location of the mining claim cannot be questioned in this proceeding. The patent is conclusive of that. The act of the Department in issuing a patent is an adjudication, and, like a judgment, is final as to all matters necessarily included in and determined by it. These are: (1) that the lands bounded and described therein are mineral lands; (2) that a discovery and location within said boundaries have been made according to law; (3) that the necessary amount of work has been performed thereon, and that all preliminary and precedent acts necessary in order to authorize and justify the issuance of the patent have been performed as the law requires.

The patent when issued relates to the time of location, from which time it takes effect. The location itself has the effect of a grant. "The patent is simply the evidence of this precedent grant, and must necessarily relate back to it." It was offered to prove that plaintiffs were estopped by joining in the application for the town site patent and accepting title thereunder. This was properly rejected. This, if an estoppel at all, was an estoppel to the right to a patent, and should have been objected as an adverse claim to the application of the plaintiffs therefor. "Objections that ought to have been made to the issuance of a patent cannot be made after the same is issued, except in certain well-defined cases; as that the land had been previously sold, or that the Land Department had exceeded its jurisdiction."

Deno v. Griffin, 20, 249 (1889). One whose action upon an adverse claim has been dismissed, cannot in another action attack the validity of the patent on the ground that the receiver accepted the purchase price and gave his receipt therefor while the action on the adverse claim was pending.

South End M. Co. v. Tinney, 35 Pac. 89 (1894). Plaintiffs' grantors applied for a patent for the C. Lode Mining Claim in 1876, alleging

location in 1872. In 1878 plaintiffs abandoned the application and the claim, ceased to occupy and possess it, and from that time until 1888 failed to do the annual work. On Jan. 5, 1887, defendants' grantors entered upon the ground and located the P. claim, covering a portion of the C. claim, and complied with the law, and remained and were in possession at the time of this suit. In 1888 plaintiffs resumed the prosecution of their application for a patent, and "without the knowledge of defendants or their grantors, and without posting or publishing any other or further notice of application for patent, procured the register and receiver to sell said C. Mining Claim to plaintiffs and to issue a certificate of purchase therefor." This action of the Land Department was induced and procured by the filing of false and fraudulent affidavits and testimony, showing that the annual labor had been done upon the claim by plaintiffs from 1872 to the date of purchase, and plaintiffs knew that these affidavits and proofs were false. This state of facts made out an equitable defence to an action of ejectment, such a defence being good in this State.

By Bigelow, J., it was held that the doctrine of the conclusiveness of the patent was inapplicable. The action of the plaintiffs was a fraud upon the defendants, and raised a trust which was enforceable in equity.

Murphy, C. J., and Belknap, J., dissented from this view.

Blake v. Butte S. M. Co., 2, 54 (1877). A patent to a mining claim, granted upon an application made under the act of 1866, grants the government title to the surface ground mentioned therein, subject to the right of other locators to follow veins or lodes held under locations made prior to May 10, 1872. The owner of such a vein, being in possession thereof, has a right to follow it within the patented surface ground of another. The act of 1872 does not impair his right, and he is not bound to file an adverse claim to protect it.

Kahn v. Old Telegraph M. Co., 2, 174 (1878). A patent title relates back to the first initial valid step which is the foundation of the right, and in pursuance of which the patent was issued. As a location notice in the acquisition of mineral lands is the first step in that direction, the same is proper evidence in connection with the patent to show the claim to which the patent refers. "In an action of ejectment, in certain cases a patent of the United States may be shown to be invalid; instances are, if the patent is void on its face, or issued without authority, or its issue prohibited, or when the government by reason of a prior grant had no title. The distinction between such cases and those in which the patent is held to be conclusive evidence of title in an action at law, is this: Where the government had the title and it passed by the grant, it can only be recalled or made subject to equitable interest of other parties by an action in equity brought for that purpose. In such cases, although fraud may have been practised, or other parties hold superior equities, the patent is not void, but only voidable in equity. If, however, the government does not have the title, or the issuance is unauthorized or prohibited by law, no title passes by the grant, and this fact may be shown at law or in any court in which the void instrument is produced as evidence of title. . . . It is argued, however, that the patent was issued without authority and

was therefore void, if the N. Y. D. claim had been abandoned, or the other facts exist which the appellant offered to show. The want of authority which will make an instrument of this kind void is a total want of authority to issue a patent for the subject of the grant, not a latent impropriety in exercising the authority, by reason of unknown imposition moving to its exercise, when the proofs authorizing the acts are formal and sufficient."

A patent to a lode mining claim passes whatever title the government had to the surface, and any vein or veins beneath not otherwise granted. The law requires that the land located must belong to the United States, and that a vein shall be discovered within its limits before location. A patent presumes a compliance with the mining laws.

LAND OFFICE DECISIONS.

An entry made is in all respects, so far as third parties are concerned, equivalent to a patent. By it the applicant acquires an equitable title which becomes complete upon proofs made and payment of purchase money, and when patent issues ripens into a fee simple which relates to the date of entry. *American Hill Quartz Mine*, Copp, 237 (1879).

Certain lands in Arkansas were surveyed in 1845 and plats showing them to be agricultural approved. They were entered as agricultural land on April 19, 1878, but it was shortly brought to the notice of the Department that the land was mineral, and, an investigation having been ordered, its mineral character was established. The agricultural entry was thereupon cancelled. "If at the date of his entry they were valuable for minerals," they were "reserved from sale," and the action of the local officers in allowing the entry was of no effect, because in violation of law. Copp, 264 (1879).

A claim is not subject to relocation in the interim between entry and issuance of patent for failure to perform annual work. Upon entry, that is, proof made and payment of purchase-money, the equitable title of the purchaser becomes complete, and the patent when issued relates to the date of entry to the exclusion of intervening rights. Rev. Stats., 2324, has reference only to title by possession. *F. P. Harrison*, 2 L. D. 767 (1884).

A mere application to make entry not properly followed up confers no exclusive rights which others are bound to wait upon indefinitely. *Snow Flake Lode*, 4 L. D. 30 (1885).

When land was returned as agricultural, and patent duly issued therefor under the Central Pacific Railroad grant, an application for patent for the same as a mining claim will not be allowed to be filed. *Samuel W. Spong*, 5 L. D. 193 (1886).

The validity of a placer patent, and its extent, as in conflict with an alleged known lode or vein, are questions that can only be determined by judicial authority. "If it be shown that the applicant has knowingly made misrepresentations as to discovery of mineral, or as to the form in which the mineral appears, the government may institute proceedings to set aside the patent. But so long as the placer

patent remains outstanding and unlimited, in my judgment, the government through its officers should not receive lode applications for any part thereof. Upon a sufficient showing being made, the patent may be set aside by proper proceedings in the courts." *Pike's Peak Lode*, 10 L. D. 200 (1890).

The issuance of a patent duly signed, sealed, countersigned and recorded, deprives the Department of further jurisdiction over the land or the title thereto. The date of the patent must be taken as the date of the record, and parol testimony is not admissible to contradict the record. *Kline v. Stephan*, 10 L. D. 343 (1890).

The issuance of a town site patent for land that contains a known lode claim conveys no title to said claim; but such patent, while outstanding, operates to remove the land described therein and the title thereto from the jurisdiction of the Department, and effectually precludes the issuance of a patent for said mining claim. Where no exception of any portion of the surface ground is made from the land described in a town site patent, departmental authority over such land and the title thereto terminates with the issuance of said patent, even though such instrument may in terms declare that no title shall be acquired thereby to any mine or valid mining claim, and it shall subsequently appear that it covers land containing a lode claim known to exist at the date of the town site entry and patent. *Pacific Slope Lode*, 12 L. D. 686 (1891).

A placer patent for land, including a known lode, not specifically described and excluded, operates to convey title to all of said land, and terminates the jurisdiction of the Department over the land covered thereby. *Pike's Peak Lode*, 14 L. D. 47. (1892).

IV. VACATION OF PATENT.

A patent obtained by fraud, or whose issuance arises from fraud, gross mistake, or violation of the law by the officers of the Land Department, is voidable in equity at the suit of the government. The government only can attack its validity; individuals have no standing to do so.¹ The procedure for the cancellation or vacation of such voidable patents, as well as of patents absolutely void, must be by bill in equity, which is not to be treated as a review or retrial of the case as it was before the Land Department. It is a proceeding for the cancellation of a conveyance, obtained by fraud or mistake, and in this respect the government as a land-owner is upon the same footing as an individual. The burden of proof is upon the government, and the presumption in favor of the patent can be overcome only by clear and convincing proof. When the government has brought a suit

¹ See p. 432 as to the manner in which an individual can obtain action by the government.

for the vacation of a patent, private parties claiming under other patents may, with the permission of the government, prosecute the suit even though abandoned by the government; but the conduct of such parties must be free from fault or neglect. Indeed, so must that of all parties for whose exclusive benefit such a suit is maintained by the government.

A patent may be vacated only by decree of a court. The officers of the Land Department have no power to recall or cancel it.

Where, however, a party who has interests adverse to a patent alleged to be either void or voidable, desires that the government institute proceedings for its cancellation, he must make application to the Land Office, which, upon his showing specifically the facts to justify it, will recommend the bringing of such proceedings. But one who seeks the intervention of the United States in a case where they are themselves not interested, must establish that he was not negligent in asserting his rights in the Land Office before the patent issued. The Land Department will not intervene where he had full opportunity of a hearing before it, and neglected to avail himself of it. On the other hand, where the fault is on the part of the government officers, and his title can be protected in no other way, the government will bring suit.

United States. Mullan v. United States, 118, 271 (1886), affirming *United States v. Mullan*, 10 Fed. 785. The selection by a State of land for school purposes, which is not open to selection by reason of its mineral quality, may be vacated and the title acquired thereunder annulled in a court of equity at the suit of the United States. The actual character of the land was known to the Department of the Interior, and the Secretary approved the lists, not because of any mistake of fact, but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853.

"The list was certified without authority of law, and, therefore, by a mistake, against which relief in equity may be afforded. As was said in *United States v. Stone*, 2 Wall. 525, 535: 'The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.'"

United States v. Iron S. M. Co., 128, 673 (1888), affirming s. c. 16 Fed. 810 and 24 Fed. 568. The facts are stated under s. c., in Chap. XV., Div. III., *post*.

Field, J.: "The form also in which the mineral appears, whether in placers or in veins, lodes or ledges, must be disclosed as far as ascertained. Misrepresentation knowingly made as to these matters by the

applicant for a patent will afterwards justify the government in proceeding to set it aside. The government has the same right to demand a cancellation of the conveyances of the United States when obtained by false and fraudulent representations as a private individual when a conveyance of his land is obtained in like manner. In this respect the United States, as a landed proprietor, stand upon the same footing with the private citizen. The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of public lands, can only be overcome by clear and convincing proof."

Brewer J., in Circ. Ct., 24 Fed. 568: "As the proofs were duly and legally made, the proceedings apparently all regular, and no adverse claims presented to the ground finally patented, I take the rule to be that, before a court will set aside a patent, it must appear, not merely that the applicant was mistaken, but that the representations were falsely and fraudulently made, and that this fact must clearly appear." "While perhaps at times frauds are perpetrated on the government, and the title to lands improperly taken, yet when, as in this case, the facts as to the character of the ground, the kind of work, as well as the amount done, are fully known to the officers of the government, I think that the courts should be slow in disturbing the title conveyed; and before they do, they should be clearly satisfied that the applicant has intentionally concealed material facts or made false and fraudulent representations."

In 16 Fed. the case came up upon demurrer, which was dismissed upon the ground that the government could maintain a bill to avoid a patent for fraud. See *St. Louis S. & R. Co. v. Kemp*, 104 U. S. 636 on p. 418, *ante*.

United States v. Marshall S. M. Co., 129, 579 (1889). When the United States retire from the prosecution of a suit instituted for the vacation of a patent without causing the appeal to be dismissed, and another party, claiming the land under another patent, is in court to prosecute the appeal, the court will not, upon motion of the appellee, dismiss it as of right, but, the government not objecting, will look into the case, and, if circumstances require, hear argument and decide the case.

Errors and irregularities in the process of obtaining a patent should be corrected in the Land Department, so far as there are means for revising the proceedings and correcting the errors. When the officers of the Land Department act within the general scope of their powers in issuing a patent, and without fraud, the patent is a valid instrument, and the courts will not interfere, unless there is a gross mistake or violation of law. Silence for more than eight years after a party has abandoned a contest for a patent and has submitted to the decision of the Land Department, however erroneous that opinion, is such laches as amounts to acquiescence in the proceedings, and precludes a court of equity from interfering to annul them.¹

¹ By Act March 3, 1891 (26 Stat. 1093), patents must be brought within six years
¹ Supp. Rev. Stats. 939, suits to vacate of the date of their issuance.

Miller, J.: "A bill in chancery, brought by the United States to set aside and vacate a patent issued under its authority, is not to be treated as a writ of error, or as a petition for a rehearing in chancery, or as if it were a mere re-trial of the case as it was before the Land Office, with such additional proof as the parties may be able to produce.

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured. Especially is it true that where the United States has not received any damage or injury, and can obtain no advantage from the suit instituted by it, the conduct of the parties themselves, for whose benefit such action may be brought, must itself be so free from fault or neglect as to authorize them to come with clean hands to ask the use of the name of the government to redress any wrong which may have been done to them."

United States v. Trinidad C. & C. Co., 137, 160 (1890). See this case under Chap. XVII., Div. I., *post*.

Northern Pac. R. Co. v. Cannon, 54 Fed. 252 (1893), C. C. Ap., 9th Circ. The mineral patents could not be attacked by appellant on the ground that no mine was ever discovered on the land, and that they had been obtained by fraud committed on the officers of the government. This question can only be determined in a controversy between the United States and the defendants.

Germania Iron Co. v. United States, 165, 379 (1897). When, while disputed matters of fact concerning a tract of public land, or the priority of rights of claimants thereto, are pending unsettled in the Land Department, a patent wrongfully issues for the tract through inadvertence or mistake, by which the jurisdiction, conferred by law upon the Department over these disputed questions of fact, is lost, a court of equity may rightfully interfere and restore such lost jurisdiction by cancelling the patent.

United States v. King, 9, 75 (1889). Under Rev. Stats. **Montana.** 2325 the certificate of the surveyor-general is evidence of the sufficiency of the work performed and improvements made upon a mining claim in his State, and in an action to annul a patent it is error to strike out of the answer an averment that the surveyor-general for Montana took the evidence required by law, and decided that the defendants had performed work and placed improvements upon the claim of the value of \$500. Where the complaint in such an action avers that the patentee did not discover any mineral lode, ledge or vein of rock in place, bearing gold or other metals, and the evidence is conflicting upon the point, proof that the claim was deemed valuable for mining purposes was held sufficient, and the patentees were not obliged to show that there was a reasonable probability of the claim becoming a source of profit to constitute a mine within the meaning of the statute.

LAND OFFICE DECISIONS.

Where there are no adverse interests, a patent will not be disturbed by proceedings to annul it, notwithstanding irregularities in issuing it. *Antelope Lode*, Copp, 171 (1875).

Where full opportunity has been given for adverse interests to be heard, and the questions involved have been decided by the Secretary of the Interior, the institution of suit to set aside the patent will not be recommended upon a petition which rests upon allegations before considered, and where no fraud is shown. *Thomas Starr*, 2 L. D. 759 (1883).

Application having been made for patent for a lode claim within the limits of a town site, protests were filed by the mayor and others, alleging that the land was non-mineral. They were abandoned and patent issued. Ejectments against the owners of the lode having been subsequently decided in their favor on the ground of the conclusiveness of the patent, application was made for the institution of suit to vacate the patent on the ground that the proofs, upon which it issued, falsely and fraudulently represented that the land was mineral, and that the requisite expenditure had been made thereon. The application was refused because the applicants had been neglectful of their interests in failing to file adverse claims, and in failing to prosecute their protests. The vacation of the patent would also have vested the title not in the United States, but in the holders under the town site. *Smoke House Lode*, 4 L. D. 555 (1886).

Suit to set aside a patent will be instituted by the government where it, though without interest, is under obligation to protect the title of third parties, who have no remedy except through such intervention. Where owners under a town-site patent called the attention of the Department to the non-mineral character of the land at the time of the application for a mineral patent, and the patent issued upon the neglect of the Department to make inquiry into the character of the land, a suit to vacate will be recommended upon proof of its non-mineral character. *The Mountain Maid*, 5 L. D. 28 (1886).

Failure to comply with local regulations may be shown by protest or adverse claim, but does not afford ground for judicial proceeding against the patentee by the government, where no conflict with the general law appears. *Robert Hawke*, 5 L. D. 131 (1886).

Under a mineral application for land partly included within a prior town-site patent, the claim must be restricted to the land not in conflict.

In the absence of an allegation or offer to prove that the land in conflict was of known mineral character prior to the issuance of the town-site patent, the record will not justify proceedings against said patent, or adverse to rights claimed thereunder; but on due showing a hearing may be ordered to determine whether suit to vacate the patent should be advised. *Thomas J. Laney*, 9 L. D. 83 (1889).

Suit to set aside a patent will not be advised by the Department in the absence of a specific showing of facts sufficient to justify such action. *James G. Negus*, 11 L. D. 32 (1890).

On the allegation duly corroborated by affidavits that certain land patented to a railroad company was in fact excepted from the grant by

reason of its known mineral character, a hearing may be directed to ascertain whether the facts justify judicial proceedings for the recovery of title. *Bullock v. Cent. Pac. R. Co.*, 11 L. D. 590 (1890).

Under an allegation properly corroborated that a tract, patented under a town-site entry, includes a mine of valuable ore, and that such mine was well known at the date of entry and issuance of patent, the Department may order a hearing to test the truthfulness of the charge with a view to subsequent judicial proceedings. *Plymouth Lode*, 12 L. D. 513 (1891).

Land included within an outstanding town-site patent is not subject to mineral entry; but an opportunity may be afforded the mineral applicant in such case to show that the mineral character of the land was known at the date of the town-site entry and patent, with a view to subsequent judicial proceedings to vacate said patent. *Protector Lode*, 12 L. D. 662 (1891).

An entry of a lode claim in conflict with a patented placer need not be cancelled, but may be properly suspended with due opportunity given for the institution of proceedings looking toward the vacation of the placer patent as to the land in conflict. *Pike's Peak Lode*, 14 L. D. 47 (1892).

Judicial proceedings will be instituted for the vacation of a patent issued by inadvertence or mistake during the pendency on appeal of a contest involving the land in question. *Lead City Townsite v. Mineral Claimants*, 17 L. D. 291 (1893).

Proceedings to vacate a patent will not be recommended without a clear and convincing showing that fraud was committed in procuring the issuance, especially when the ground is owned by *bona fide* purchasers and the application is not made until twelve years after patent. *Butte & Boston M. Co.*, 21 L. D. 125 (1895).

Where a mineral patent is based on an erroneous survey, suit will be instituted to vacate it. *United States v. Rumsey*, 22 L. D. 101.

CHAPTER XV.

DIFFERENT KINDS OF CLAIMS, THEIR SPECIAL FEATURES
AND CHARACTERISTICS.

I. Lode Claims.	III. Lodes in Placers.
A. Definition of Lode; Apex Rule.	IV. Tunnel Claims.
B. Cross and Uniting Veins.	V. Mill Sites.
II. Placer Claims.	VI. Water Right Claims.

I. LODE CLAIMS.

A. *Definition of Lode; Apex Rule.*

THE "valuable mineral deposits in lands belonging to the United States" which, by Rev. Stats. 2319, are thrown open to exploration and purchase, are divided generally into *lode or vein* deposits and *placer* deposits, which two classes are located in distinct ways. Those plots of ground, which are known as "claims," are, when located, also subject to different rules.

Lode claims are described in the statute as "mining claims upon veins or lodes of quartz or other rock *in place* bearing gold, silver, cinnabar, lead, copper, or other valuable deposits" (Rev. Stats. 2320), and as "mining locations . . . on any mineral vein, lode, or ledge situated on the public domain" (Rev. Stats. 2322). The primary requisite of such a claim, therefore, "is that *it shall be upon a lode or vein of mineral-bearing rock.*" The meaning of these terms hence becomes of vital importance. The definitions thereof adopted by the courts are not the definitions of the geologists. These words are used in the statutes in the signification which they convey, not to the scientific man, *but to the practical miner.*

A lode, therefore, in the above clauses means a body of mineral-bearing rock lying within walls (which should be well defined, but sometimes are not) of neighboring rock, usually of a different

kind, but sometimes of the same kind,¹ and extending longitudinally between those walls in a continuous zone or belt. The distance between the walls may decrease in places until the thickness of the vein is unappreciable, or until the vein matter entirely disappears between them; but usually there is a continuing crack or crevice, though even this is sometimes hardly appreciable. So long, however, as the walls remain reasonably well defined or the continuity of the mineral-bearing matter between them remains established, the vein exists.²

A lode was defined in the *Eureka Case* to be "any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes." This definition, which has received the approval of the highest courts, is, however, rather a general description than an accurate definition. It is not a conclusive test, but a guide by which to determine whether or not the mineral deposit in question is or is not to be treated as a vein or lode. The mineralized zone or belt may contain within its limits small subordinate veins in a geological sense, but this will not detract from its character as a lode. But very broad metaliferous zones between defined boundaries will not be allowed to swallow up true fissure veins existing within these boundaries, where the width of such a zone is, as compared with the legal width of a claim, unreasonably large; for in such a case to treat this as a lode would defeat the purpose of the statute. The only essential quality of the rock included within the boundaries is that it must contain a trace of valuable mineral. It may be loose and friable, or very hard. Still it is vein matter if it is enclosed within the country rock. Thus the two essential elements of a lode are (a) the mineral-bearing rock, which must be in place and have reasonable trend and continuity, and (b) the reasonably distinct boundaries on each side of the same.³

If either of these is well established, slight evidence will be accepted of the existence of the other. Whether or not a par-

¹ An example of this, which is frequently met with, is when the country rock is impregnated with ore along and often on both sides of a small fissure.

² See Geological Preface.

³ See detailed discussion of the characteristics of true lodes, veins, contact deposits, etc., in the Geological Preface.

ticular deposit conforms to the foregoing requirements, and is a lode or vein, is in each case a question of fact for determination by the jury.

Rev. Stats. 2322 provides: "The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

This statement of the locator's rights to follow upon its downward course that portion of any vein having its apex within the surface lines of the location, which lies between vertical planes drawn downward through the end lines, is called the *apex rule*. It is in conflict with the common law rule that the owner of the surface also owns the minerals under the surface. That rule, however, is entirely aside from the case. In a lode claim the principal thing is *the lode*. This it is that is granted by the government, and the surface ownership is for the purpose of holding the lode, and the surface only serves to define the locator's rights upon the lode. The important things in the application of the rule, therefore, are the identity of the apex and the position of the surface lines. The intention of the statute is that the claim should be located along the course of the discovered vein. The

ideal location is upon a vein which is a straight line, and which is cut by the parallel end lines at right angles to it. Nature, however, has not always conformed herself to this ideal, as many veins do not follow a straight course and are often quite irregular. The requirement, however, that the location must be in the direction of the course of the vein must generally be complied with if the locator wishes to hold full fifteen hundred feet upon it.

The locator is bound by the lines which he himself lays out, and the courts have treated those lines as end lines through which the vein passes on its strike, or course across country, whether the locator so intended them or not.¹ If, therefore, the location is made across the vein, the side lines become the end lines, and in following the vein upon its downward course he is confined *within the plane drawn vertically through those lines* extended. If, however, one of the end lines, as drawn, crosses the vein, which on its onward course through the claim passes out of one of the side lines before reaching the other end line, the law will establish one new end line, which is a line parallel to the other end line as laid out, but passing through the point where the apex of the vein as it passes out of the claim intersects the side line; the other end line remaining the same as laid out. The locator may even himself abandon the portion of his claim beyond this point of intersection, and lay out a new end line as above.

When a locator claims title to a full claim of fifteen hundred feet long and six hundred feet wide, theoretically he should prove the existence of a lode extending throughout the claim; but the slightest evidence that the strike of the vein is in the direction of the location is sufficient to shift the burden of proof upon his adversary. If, however, the lode should come to an end at a point within the boundaries of the claim, the owner thereof will be confined between a perpendicular plane drawn through the end line which is intersected, and another plane drawn through the terminus of the lode; but he cannot go beyond the plane of his other end line as laid out.

The fact that a lode claim intersects a located claim does not negative the validity of the part beyond the intersecting claim, if the lode actually extends into that part. If, however, the inter-

¹ If the claim has been patented, the lines as defined in the patent are of course controlling.

secting claim is a placer or a mill site, this is treated in the Land Department as conclusive against the continuity of the lode.¹

This principle that the locator may not pass out of his lines along the course of the vein finds expression in the rule that the locator may follow his vein outside his side lines upon the dip but not upon the strike. The dip of the vein is the "*downward course*" of the statute. The strike of the vein is its *onward course*, its direction or trend across and through the country. Upon the strike the locator is confined to the section of the vein between his end lines; upon the dip he may follow it indefinitely, no matter if it takes him beneath the ground of another and outside the downward vertical extension of his own side line boundaries.

By Rev. Stats. 2820 it is provided that "the end lines of each claim shall be parallel to each other." This provision is obligatory. If the locator fails to so draw his end lines he may not have advantage of the apex rule, and in working his vein may not pass outside his surface lines. The reason of this rule, which governs its application, is that in irregular locations it is impossible to determine which are the true end lines, and consequently impossible to apply the apex rule. A slight divergence from the parallel is not important, if it arises from difficulty in marking the lines by reason of the nature of the ground and if the locator has followed substantially the directions of the statute in marking his boundaries, that is, if his side lines are laid in the direction of the strike of the lode and his end lines are laid across it.²

It is the true end lines that must be substantially parallel. The locator by making two lines parallel cannot by that means establish them as end lines; what are such is determined by the course of the vein, and, as we have seen, the locator's original side lines are often his actual end lines, when the vein crosses the claim as originally laid out. The end lines must always be the lines through which the vein passes on the strike when it passes out of the claim.

The other important element of the apex rule is that the apex of the vein must lie within the surface lines extended vertically downward. The apex of a vein is *the part nearest the surface*, and usually is the more or less exposed outcropping edge of the

¹ See, however, *post*, p. 472, n.

² As to triangular locations, see *Montana Co. v. Clark*, 42 Fed. 626, *post*.

vein where it comes to the surface. It is that portion of the vein which is visible when the solid rock formation is cleaned of all soil, gravel, vegetable mould, slide rock, or other detrital or foreign material by which it is often covered. The outcropping of a vein often protrudes through this loose material, though when covered by it for many feet it is nevertheless a true outcrop or apex as it comes to the surface of the solid hard rock formation beneath. The word "apex" is not used in its geometrical sense. It is not necessarily a point. It may be of great length and considerable thickness.

The mere fact of proximity to the surface is insufficient to establish the apex without the evidence that it is the upper edge or end of the vein. Outcrop on the actual surface is not essential to an apex: it may exist at considerable depths below the surface, as above shown. Again the crevice may come to the surface, but may not contain mineral matter until it has been followed down for some distance; yet it is nevertheless an apex. Nor is *outcrop* synonymous with *apex*, for a portion of the vein on its dip may in rare instances be exposed below the true apex.

It is essential that in order to follow the dip of the vein the apex should be between the vertical planes of the surface lines. The course of this apex is the strike of the vein. When the apex or a portion thereof is established to be within the boundary planes, the locator may follow the dip of the vein indefinitely, whatever its direction or inclination may be. The entire vein, that is to say, so much of it as lies between the planes of his end lines *extended*, is his property. And it has been held in Utah that this ownership extends to the entire width of the vein, even where the width of the apex is such as to extend beyond the side lines of the claim. It is hardly to be supposed that this will be followed elsewhere.

To dig mineral from a vein whose apex is in the claim of another is a trespass.

The locator is not confined to the vein upon which he based his location. All veins or lodes having their apices within the planes of the surface lines extended downward are his, and possession of the surface is possession of all such veins or lodes within the prescribed limitations. He is also entitled to all loose and decomposed mineral matter within the surface boundaries, if placed within these by natural agencies. The presumption in the first

place is that all minerals found within his boundary planes belong to the owner of the claim. And upon a stranger claiming the right to mine inside of these planes rests the burden of proving that he is mining upon the dip of a vein whose apex is outside of the claim, and within a claim belonging to him. That is, in order to establish his right and justify the apparent trespass, he must prove that he is the legal possessor of the vein which he is following. If he fails to establish *both* of these points he is a trespasser.¹

While a location made upon the dip of a vein instead of its apex may be good, still a subsequent location upon the apex gives the property therein to the subsequent locator. A subsequent location on the dip is of course a trespass. Where a dispute arises between adjoining owners as to the right to mine a certain deposit, they may compromise the dispute by agreeing upon a line of division; and in construing this agreement, the apex rule will have no application, but the plane drawn perpendicularly through this line will be an absolute limit to the operation of the parties.

The language of the statute applies to locations made under the act of 1866, although under that act the locator was entitled to but one lode. But a patent under the act of 1872 will not give the locator the right to take ledges located under the act of 1866, and the latter locator is not required to protect his rights by an adverse claim.

The apex rule has an exception in the case of patented agricultural land. As the entire ownership of this land to the centre of the earth has been vested by government grant in the patentee, the United States can give no one else the right to enter upon any part of it, and consequently the locator of mineral ground cannot follow his vein under such land. And likewise the agricultural patentee, in working veins discovered upon his land, is bound by the common law rule, and cannot go outside of his boundaries extended vertically downward.

United States. *Flagstaff S. M. Co. v. Tarbet*, 98, 463 (1878). The intention of both the act of 1866 and the act of 1872 is "that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the sur-

¹ A contrary view is held in *Montana Co. v. Clark*, 42 Fed. 626, and in *Jones v. Prospect M. Co.*, 31 Pac. 642, viz., that only to prove ownership of the claim, but that the apex of the vein in question is within his lines. the burden rests upon the plaintiff not

face of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

"The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface.

"As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called; which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See Rockwell, pp. 56-58, and pp. 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it.

"The plaintiff in error contended, and requested the court to charge, in effect, that having received a patent for two thousand six hundred feet in length and one hundred feet in breadth, commencing at the Flagstaff discovery, on the lode at the surface, it was entitled to two thousand six hundred feet of that lode along its length, although it diverged from the location of the claim, and went off in another direction. We cannot think that this is the intent of the law."

"We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein; and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the act of Congress requires that this course should be sub-

stantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop, or surface explorations and workings. It is on this line that claims will naturally be laid, whatever the character of the surface, whether level or inclined." Bradley, J.

A locator working beneath the surface into the dip of a vein belonging to another, who is in possession of his location, is a trespasser, and liable to an action for taking ore therefrom.

Tabor v. Dexter, 9 Mo. Min. Rep. 614 (1879), C. C. D. Colo. "Whether the ore is loose and friable or very hard, if the enclosing walls are country rock, it may be located as a vein or lode. But if the ore is on top of the ground, or has no other covering than the superficial deposit, which is called alluvium, diluvium, drift, or débris, it is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location. In this bill it is alleged that the overlying material is boulders and gravel, which cannot be in place as required by the act. . . . A location on such a deposit of ore may be sufficient to hold all that lies within the lines, but it cannot give a right to ore in other territory, although the ore body may extend beyond the lines."

Stevens v. Williams, 1 McCrary, 480 (1879), C. C. D. Colo. The top or apex of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken at its edge so as to appear to be the beginning or end of the vein. If a vein, at its highest point, turns over and pursues its course downward, then such point is merely a swell in the mineral matter, and not a true apex.

Where there is a true apex within the surface boundaries of a claim, the claimant can follow the vein on its downward dip beyond his vertical side lines, and he may follow the vein beyond such side lines at every point where the apex is within his surface lines, even though his location for the full length of the claim be not along the line of such apex; and he is entitled to follow the same in its departure from the perpendicular in any degree.

"The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines vertically extended, as though they were his end lines; but if he happens to strike out diagonally, as far as his side lines include the apex, so far he can pursue it laterally; if the vein projects beyond his side lines, then it is only a question as to the distance which he can include this vein within his side lines."

Eureka Case; Eureka Con. Min. Co. v. Richmond M. Co. of Nevada, 4 Sawy. 302 (1877), C. C. D. Nev., affirmed in *Richmond M. Co. v. Eureka Co.*, 103, 839 (1880). E. and R., two mining companies,

in settlement of the differences between them respecting the possession of certain ground, and the ores therein contained, in the Eureka Mining District in Nevada, entered into an agreement establishing between specified points on the earth's surface a boundary line between their respective claims, and stipulating that E. would convey to R. all the mining ground and claim lying northwesterly of said line, including "all veins, lodes, ledges, deposits, dips, spurs, and angles on, in, or under the same contained," and that R. would convey to E., with a covenant of warranty against its own acts, all its right, title, and interest in and to all the land or mining ground situated on the southeasterly side of said line, and in and to "all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs, and angles on, in, or under the said land or mineral ground." The agreement further declared that it was the object and intention of the parties to confine the workings of R. "to the northwesterly side of the said line continued downward to the centre of the earth." *Held*, that the agreement must be construed as extending the boundary line downward through the dips of the veins or lodes, wherever they may go in their course toward the centre of the earth.

Field, J., in the Circuit Court: "It is difficult to give any definition of the term (lode) as understood in the act of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same course, impressed with the same forms, and appearing to have been created by the same processes.

"Examining now, with this definition in mind, the features of the zone which separate and distinguish it from the surrounding country, we experience little difficulty in determining its character. We find that it is contained within clearly defined limits, and that it bears unmistakable marks of originating in all its parts under the influence of the same creative forces. It is bounded on the south side for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness, and on its north side, for a like extent, by a belt of clay or shale ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone, in the Jackson mine, the quartzite and shale approach so closely as to be separated by a bare seam less than an inch in width. From that point they diverge, until, on the surface in the Eureka mine, they are about five hundred feet apart, and on the surface in the Richmond mine, about eight hundred feet. The quartzite

had a general dip to the north, at an angle of about forty-five degrees, subject to some local variations as the course changes. The clay or shale is more perpendicular, having a dip at an angle of about eighty degrees. At some depth under the surface these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked they are now only from two to three hundred feet apart.

"The limestone found between these two limits — the wall of quartzite and the seam of clay or shale — has at some period of the world's history been subjected to some dynamic force of nature, by which it has been broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, except in places of a few feet each, so far as explorations show, all traces of stratification; thus specially fitting it, according to the testimony of the men of science to whom we have listened, for the reception of the mineral which, in ages past, came up from the depths below in solution and was deposited in it. Evidence that the whole mass of limestone has been, at some period, lifted up and moved along the quartzite, is found in the marks of attrition engraved on the rock. This broken, crushed, and fissured condition pervades to a greater or less extent the whole body, showing that the same forces which operated upon a part operated upon the whole, and at the same time. Wherever the quartzite is exposed, the marks of attrition appear. Below the quartzite no one has penetrated. Above the shale the rock has not been thus broken and crushed. Stratification exists there. If in some isolated places there is found evidence of disturbance, that disturbance has not been sufficient to affect the stratification. The broken, crushed, and fissured condition of the limestone gives it a specific, individual character, by which it can be identified and separated from all other limestone in the vicinity.

"In this zone of limestone numerous caves or chambers are found, further distinguishing it from the neighborhood rock. The limestone being broken and crushed up, as stated, the water from above readily penetrated into it, and operating as a solvent, formed these caves and chambers. No similar cavities are found in the rock beyond the shale, its hard and unbroken character not permitting, or at least opposing, such action from the water above. Oxide of iron is also found in numerous places throughout the zone, giving to the miner assurance that the metal he seeks is in its vicinity.

"This broken, crushed, and fissured condition of the limestone, the presence of the oxides of iron, the caves or chambers we have mentioned, with the wall of quartzite and seam of clay bounding it, give to the zone in the eyes of the practical miner an individuality, a oneness, as complete as that which the most perfect lode in the geological sense ever possessed. Each of the characteristics named, though produced at a different period from the others, was undoubtedly caused by the same forces operating at the same time upon the whole body of the limestone.

"Throughout this zone of limestone, as we have already stated, mineral is found in the numerous fissures of the rock."

"If the scientific definition of a lode, as given by geologists, could be accepted as the only proper one in this case, the theory of distinct

veins existing in distinct fissures of the limestone would be not only plausible, but reasonable; for that definition is not met by the conditions in which the Eureka mineralized zone appears. But as that definition cannot be accepted, and the zone presents the case of a lode, as that term is understood by miners, the theory of separate veins as distinct and disconnected bodies of ore falls to the ground. It is, therefore, of little consequence what name is given to the bodies of ore in the limestone, whether they be called pipe veins, rake veins or pipes of ore, or receive the new designation suggested by one of the witnesses; they are but parts of one greater deposit which permeates in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone, from the Jackson mine to the Richmond inclusive.

"The acts of Congress of 1866 and 1872 dealt with a practical necessity of miners: they were passed to protect locations on veins or lodes, as miners understood those terms."

End lines, though not named in the act of 1866, are necessarily implied, and in following the dip of the vein the owner of the location may not pass beyond planes drawn downward through the end lines or at right angles with a line representing the general course or strike of the lode.

Mount Diablo M. & M. Co. v. Callison, 5 Sawy. 439 (1879), C. C. D. Nev. Hillyer, D. J.: "It was considered in that case (*Eureka Case*) that the terms 'vein' and 'lode,' as used by Congress, for reasons there given, could not be restricted always to 'aggregations of mineral matter in fissures of rocks,' that is to say, to typical fissure veins, but must be so extended as to include any other aggregation of mineral matter containing ores lying within clearly defined boundaries. Such boundaries were found in that case in the quartzite on the south and the clay slate on the north. Between those boundaries, however, no others appeared clearly dividing the included rock or vein matter; and it never was intended in that case to hold that every metalliferous zone of country to which boundaries could be found must be regarded as one vein or lode, for this would be to reduce all mining districts to one lode." "Looking, then, at this metalliferous zone as a whole, at the point where the claims in question lie, it is impossible to find clearly defined boundaries. There is, however, such a zone there, and there is, no doubt, a limit beyond which the rocks are not impregnated with silver, which limit is at present not clearly ascertained."

"Having such a zone or district, when we find within it fissures like that opened by the Callison, filled with ore, we think we must regard them as veins or lodes. For, while metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, although not in a fissure, a broad metalliferous zone cannot be permitted to swallow up, under the name 'lode,' true fissure veins found within its limits. We think the Callison claim must be regarded as being upon such a fissure and as having unmistakable visible boundaries." "The act of 1872 (Rev. Stats. 2322) recognizes locations made prior to its passage, the surface lines of which included more than one vein or lode. The language is: 'The locators of all mining locations *heretofore* made . . . shall have the exclusive right of possession and enjoy-

ment of all the surface included within the lines of their location, and of all veins, lodes, or ledges the top or apex of which lies inside such surface lines.'

"It is very clear that this language reaches the case of locators who had located claims while the act of 1866 was in force, the surface lines of which included the tops of more than one lode, and confirms their possession to all the surface and all the lodes included within their lines. That is the case at bar. The top or apex of the Callison lode lies within the surface lines of the Dinero, and within forty-seven and a half feet of the location monument which Hanke placed on the Dinero croppings; and it follows that the plaintiff is entitled to the exclusive possession of the Callison lode, unless for non-compliance with the law forfeiture of the Dinero claim has been incurred."

North Noonday Mining Co. v. Orient Mining Co., 1 Fed. 522 (1880), C. C. D. Cal. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin, or many feet thick, or irregular in thickness, and it may be rich or poor, provided it contains a trace of any of the metals named in the statute.

Zollars v. Evans, 5 Fed. 172 (1880), C. C. D. Colo. On the public domain of the United States a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of fifteen hundred feet in length and three hundred feet in width, he must prove a lode extending throughout the claim.

The sinking of a shaft outside of the ground in dispute, and running drifts thence to the ground in dispute, will not avail the plaintiff in ejectment, unless he can further show the discovery of a lode in such shaft, with the extension of the lode to the ground in dispute.

Iron Mine v. Loella Mine, 2 McCrary, 121 (1880), C. C. D. Colo.; s. c. 3 Fed. 368.¹ Where a location has been made upon the top, or apex of a lode, the miner may follow it to any depth, although in its downward course it may enter adjoining land.

Hallett, D. J., charging jury: "The top or apex is the end or edge or terminal point of the lode nearest the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will enclose it, the lode may be held by such location. Now whether there is such an end, edge or terminal point of the vein or lode at any depth in plaintiff's grounds is the question to be determined by the evidence." "No location can be made on the middle part of a lode, or otherwise than at the top or apex, which will enable the locator to go beyond his line."

Van Zandt v. Mining Co., 8 Fed. 725 (1881); s. c. 2 McCrary, 159, C. C. D. Colo. As between two locators, the boundaries of whose respective claims included common territory, priority of location confers the better title, provided a vein in place was discovered in the discovery shaft, and provided also that it extended to the ground in controversy. Nor are the rights of the parties changed by the fact

¹ Wrongly attributed to Nevada in this report.

that the senior location was on the dip of the lode, the junior on the top or apex.

Jupiter Mining Co. v. Bodie Con. M. Co., 11 Fed. 666; s. c. 7 Sawy. 96 (1881), C. C. D. Cal. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin, or many feet thick, or irregular in thickness; and it may be rich or poor, provided it contains any of the metals named in the statute. But it must be more than detached pieces of quartz or mere bunches of quartz not in place.

Iron S. M. Co. v. Cheesman, 116, 529 (1886). Miller, J.: "What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the circuit it has often been attempted. Mr. Justice Field, in the *Eureka Case*, 4 Sawy. 302, 311, shows that the word is not always used in the same sense by scientific works on geology and mineralogy, and by those engaged in the actual working of mines. After discussing these sources of information, he says: 'It is difficult to give any definition of the term as understood and used in the acts of Congress which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to a lode in the judgment of geologists. But to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.'

"This definition has received repeated commendations in other cases, especially in *Stevens v. Williams*, 1 McCrary, 480, 488, where a shorter definition by Judge Hallett, of the Colorado Circuit Court, is also approved, to wit: 'In general it may be said, that a lode or vein is a body of mineral, or mineral body of rock within defined boundaries, in the general mass of the mountain.'

"This lode, ledge, or vein, which may thus be possessed and enjoyed outside of the limits of the surface side lines extended vertically, must be the same vein or lode on the apex or outcrop of which the claim of the party has been located. He can only go outside of this imaginary perpendicular wall to possess or enjoy a vein which, being *his* inside that artificial line, he has the right to follow or pursue in its extension outside of these lines. The identity of the vein is, therefore, essential to his right to its possession there.

"Now, a vein containing the precious metals is by no means always a straight line of uniform dip, or thickness, or richness of mineral matter throughout its course. Generally, the veins are found in what, when the mineral is taken out of them, constitute clefts or fissures in the surrounding rock, with a well defined wall above and below of

different kinds of rock, as porphyry on one side, above or below, and limestone on the other.

"So long as these enclosing walls can be distinctly and continuously traced, and the mineral matter of the same character found between them, there can be no doubt that it is the same vein. But sometimes the cleft between the enclosing rocks, called in mining parlance the country rock, diminishes so as to be scarcely perceptible. Sometimes for a short distance the fissure disappears entirely, and again is found distinctly to exist a little farther on. Again it is seen that, though the underlying and superposing country rock is there, the mineral deposit ceases to be found, but, following the fissure, it reappears again very soon.

"It also happens that both fissure and mineral come to an end and are found no more in that direction, or, if found, so far off, or so deflected from the original line as to constitute no part of that vein.

"Of course it is sometimes easy to see that it is the same vein all through. It is also easy to see in some instances that the vein is run out; is ended.

"But there are other cases of a class of which that before us is one, where it is a matter of extreme difficulty to lay down such rules for the guidance of the jury as will best aid them in arriving at a just verdict.

"We are not able to see how the judge who presided at the trial of the case could have better discharged this delicate task than he has in the charge before us, to which the exceptions are taken, and we give here verbatim that part of it relating to this point, as found in the bill of exceptions:—

"Upon the evidence before you, these parties are to be regarded as owning the surface of the land by them respectively claimed, and all that rightfully goes with the surface under the law. No question is presented as to the right of the plaintiff to the Lime location. Holding by patent from the government, the plaintiff must be regarded as the owner of that claim, and all lodes and veins existing therein. The statute gives the owner of the lode, the one who may locate it at the top and apex, the right to follow it to any depth, although it may enter the land adjoining. And if the Lime location was made on a lode or vein which descends from thence into the Smuggler location, the right of the plaintiff to follow the lode into the Smuggler ground and to take out ore therefrom cannot be denied. Thus, the principal question for your consideration is, whether there is a lode or vein in the Lime location which extends from that claim into the Smuggler claim? If a lode is found in that claim, all the evidence tends to prove that the top and apex of such lode is in that claim. There is no room for controversy on that point. To determine whether a lode or vein exists, it is necessary to define those terms; and, as to that, it is enough to say that a lode or vein is a body of mineral, or mineral-bearing rock, within defined boundaries in the general mass of the mountain. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries; with either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral-bearing rock in the general mass of

the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, boundaries are implied. On the other hand, with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, although at considerable intervals and in small quantities, it is called a lode or vein. To maintain the issue on its part, the plaintiff must prove that a lode as here defined extends from the Lime to and into the Smuggler claim.

“Reverting to that definition, if there is a continuous body of mineral or mineral-bearing rock extending from one claim to the other, it must be that there are boundaries to such body and the lode exists. Or if there is a continuous cavity or opening between dissimilar rocks in which ore in some quantity and value is found, the lode exists. These propositions are correlative and not very different in meaning, except that the first gives prominence to the mineral body, and the second to the boundaries.

“Proof of either proposition goes far to establish a lode, and it may be said, without proof of one of them a lode cannot exist. The proposition of the plaintiff is, that the evidence before you shows that a lode exists in the ground in controversy, as already defined. The defendants deny that proposition, and the case turns on that question. They concede that there is, in the territory open by the works, ore in detached masses or fragments, but so intermingled with the enclosing rocks that it cannot be regarded as a continuous body, or as marking the line of a lode or vein. All that has been said by witnesses about rock in place is valuable only as it tends to prove or disprove the existence of a crevice or opening extending from one claim to the other. Excluding the wash, slide, or debris on the surface of the mountain, all things in the mass of the mountain are in place. A continuous body of mineral or mineral-bearing rock, extending through loose and disjointed rocks, is a lode as fully and certainly as that which is found in more regular formation; but if it is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein. Recognizing this, the plaintiff has given evidence to establish the existence of porphyry and lime in regular order, with an opening between them filled with vein matter.

“The defendants sought to show that the ground is broken and disjointed, and the several parts so intermingled that no lode can extend from one claim to the other.

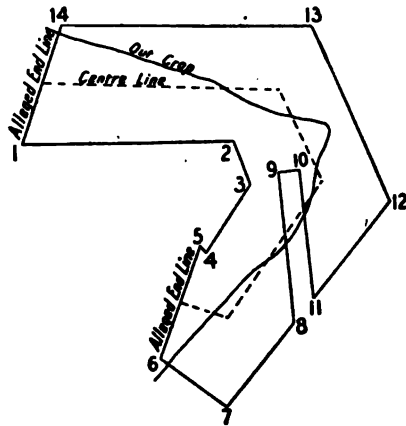
“It is a question to be decided by the weight of testimony rather than the number of witnesses; upon the effect which the testimony has on your minds, accepting that which seems to you to be worthy of belief and rejecting the other. And that, I believe, gentlemen, is the one and the only question in the case. If you find it affirmatively, of course you will return your verdict for the plaintiff; and if in the negative, you will find for the defendants.’

“And to so much of said charge as reads as follows: “But if it

is not continuous, or is not found in a crevice or opening which is itself continuous, it cannot be called by that name. In that case it lacks the individuality and extension which is an essential quality of a lode or vein." To which plaintiff's counsel then and there excepted.'

"If the language here excepted to stood alone, it would be correct, though possibly too general or exclusive. Certainly the lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Nor would a short partial closure of the fissure have that effect if a little farther on it recurred again with mineral-bearing rock within it. And such is the idea conveyed in the previous part of the charge. 'On the other hand,' said the judge, 'with well defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found, *although at considerable intervals and in small quantities*, it is called a lode or claim.'

Iron Silver Mining Co. v. Elgin M. Co., 118, 196 (1886), affirming 14 Fed. 377, C. C. D. Colo. Where a claim was located as in the diagram, it was held that the locator could not follow a vein outside his eastern boundary (12-13) under the surface of a valid claim adjoining on that side, upon the ground that his end lines, if he had any, were not parallel, and he could not pass outside of his surface lines.



Field, J.: "The framers of the statute of 1872 evidently proceeded upon the theory that a claim on a lode, following its outcroppings on the surface for the distance allowed, with a definite extension on each side of the middle of the vein, would generally take the form of a parallelogram. It provided that the length of a claim subsequently located, whether by one or more persons, should not exceed fifteen hundred feet; that its extension on each side of the middle of the vein at the surface should not exceed three hundred feet; and that its end lines should be parallel to each other. Rev. Stats. 2320. A section of the lode, within vertical planes drawn downward through the lines marked on the surface, was designed as the grant to the original locator; but, as the vein in its downward course might deviate from a perpendicular and pass out of the side lines, the right was conferred to follow it outside of them, but within planes through the end lines drawn vertically downward, and continued in their own direction."

"The difficulty arising from the section (2322) grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not

parallel, or, if so, are not at a right angle to the course of the vein. This difficulty must often occur where the lines of the surface location are made to control the direction of the vertical planes. The remedy must be found, until the statute is changed, in carefully making the location, and in postponing the marking of its boundaries until explorations can be made to ascertain, as near as possible, the course and direction of the vein." "If the first locator will not, or cannot, make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences. He can only assert a lateral right to so much of his vein as lies between vertical planes drawn through those lines. Junior locators will not be prejudiced thereby, though subsequent explorations may show that he erred in his location."

If the top or apex of several veins are within the claim, end lines perpendicular to all of these are impossible. The uniform practice of the Land Department is also of importance in fixing the rule. *Flagstaff S. M. Co. v. Tarbet*, ante, cited and quoted.

"Under the act of 1886 parallelism in the end lines of a surface location was not required, but where a location has been made since the act of 1872, such parallelism is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines. His lateral right by the statute is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction, that is, between parallel vertical planes. It can embrace no other portion.

"The exterior lines of the Stone claim form a curved figure somewhat in the shape of a horseshoe, and its end lines are not and cannot be made parallel. What are marked on the plat as end lines are not such. The one between numbers 5 and 6 is a side line. The draughtsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure, and apparently for no other reason than their parallelism, called them end lines.

"We are, therefore, of opinion that the objection that by reason of the surface form of the Stone claim, the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof. Besides, if the lines marked as end lines on the plat of the claim can be regarded as such lines of the location, no part of the Gilt Edge claim falls within vertical planes drawn down through those lines continued in their own direction."

Hyman v. Wheeler, 29 Fed. 347 (1886), C. C. D. Colo. In determining whether a lode extends from defendant's claim to plaintiff's location, and has its apex therein, the persistence of the ore through these and the intervening claims is of little weight, unless there is evidence in plaintiff's claim tending to show a crevice of continuous ore or mineralized rock; with such evidence, it is of considerable weight.

Plaintiff's location and defendant's location were some distance apart, and overlapped so that the north end of plaintiff's location was nearly parallel to defendant's location for about the distance of seven hundred and fifty feet. In asserting a right to follow a vein or lode on its dip

within his own location and into defendant's location, it was held that plaintiff must show the outcrop or apex of such vein or lode to be in his own location and throughout the ground in controversy.

Argentine M. Co. v. Terrible M. Co., 122, 478 (1887). The statute contemplates that the location of a lode claim shall be along the course of the lode or vein. When a mining claim crosses the course of the lode or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode; and thus the lines which separate the location of the parties in this case are end lines across which, as they are extended downward vertically, the defendant cannot follow a vein even if the apex or outcropping is within its surface boundaries.

Amador Medean Gold Mining Co. v. South Spring Hill Gold Min. Co., 36 Fed. 668 (1888), C. C. N. D. Cal. An owner under a patent of mineral lands, including a gold-bearing vein or lode having its apex within the boundaries of the land patented is not entitled to follow his vein or lode across his exterior boundaries into the lands of the adjacent proprietor, holding an elder title under a patent for agricultural lands.

Sawyer, J.: "By the entry and payment by Hammock, there being no known mine on the land, the entire interest to the centre of the earth vested in him, and there was nothing left in the United States for a subsequent grant to other parties to operate upon."

Cheesman v. Shreve, 37 Fed. 36 (1888), C. C. D. Colo. Parties who enter beneath the surface within the lines of ground patented to another, and seek to mine and take ore therefrom, are *prima facie* trespassers.

Cheesman v. Hart, 42 Fed. 98 (1890), C. C. D. Colo. Where the strike of the vein passes perpendicularly through the end lines of the claim, the fact that between the end lines the outcrop is forced by the surface influences of slides and debris to meander so as to make slight variations from the general direction of the strike, does not prevent the side lines from being parallel with the vein; it is only necessary that they be substantially parallel.

The fact that a claim is cut by another valid claim crossing it does not make the line of such intersection the end line of the claim when it extends beyond the intersecting claim.

The right to follow the vein on its dip is not cut off by the issue of a mineral patent for the land into which the vein dips.

Montana Co. v. Clark, 42 Fed. 626 (1890), C. C. D. Mont. Where a claim is located so as to overlap a valid existing claim, and the part which does not conflict, and therefore is valid, is in the shape of a triangle, it is consequently without end lines, and the locator has no legal right to follow his vein outside of his side lines. A location upon premises belonging to another can give no rights whatever.

If, however, he does so follow it under an adjoining claim belonging to plaintiff, the latter cannot restrain him by injunction, since the apex is within the lines of defendant's claim, and consequently plaintiff, who only owns such veins as have their apex within his own lines, has no right thereto. "I do not conceive that there is any conflict between the doctrine here expressed and that set forth in *Cheesman v. Shreve*,

37 Fed. Rep. 36. The presumption may be that he who enters within the lines of another's mining claim on the surface or beneath the same is a trespasser; but where, as in this case, the fact is alleged that the defendants entered upon the Marble Heart claim by following down on its dip a vein or lode whose top or apex was without the limits of plaintiff's premises, a case is stated that shows that defendants were not trespassers upon plaintiff's premises, that they were following premises that did not belong to plaintiff." Knowles, J.

Blue Bird M. Co. v. Largey, 49 Fed. 289 (1892), C. C. D. Mont. Whether a certain mine is a vein, lode or ledge, within the meaning of Rev. Stats. 2320, 2322, 2325, and what is the top or apex of a vein, are questions of fact, the decision whereof involves no federal question within the Removal of Causes Act.

When the vein on the strike passes through one end line and one side line of the claim, the owner's rights are determined by *Iron S. M. Co. v. Elgin M. Co.*, 118 U. S. 196, and the case comes under the rule that, when a proposition has been decided by the United States Supreme Court, it no longer involves a federal question.

Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143, 394 (1892). What amount of mineral is necessary to constitute a lode or vein is a question for a jury.

Under a large area in the Leadville mining district lies a body of mineral whose general horizontal direction, together with the sedimentary character of the superior rock, indicates something more of the nature of a deposit like a coal bed than of the vertical and descending fissure vein, in which silver and gold are ordinarily found. Titles to portions of this horizontal deposit, or "blanket vein" as it is generally called, may be acquired under the provisions of the statutes as to veins and lodes.

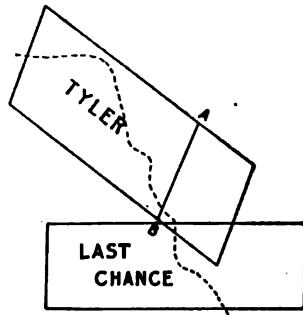
"The fact that so many patents have been obtained under these sections, and that so many applications for patents are still pending, is a strong reason against a new and contrary ruling. That which has been accepted as law and acted upon by that mining community for such a length of time should not be adjudged wholly a mistake and put entirely aside because of difficulties in the application of some minor provisions to the peculiarities of this vein or deposit."

Larkin v. Upton, 144, 19 (1892), affirming s. c. 7 Mont. 449. The top or apex of a vein must be within the boundaries of the claim in order to enable the locator to perfect his location and obtain title; but the apex is not necessarily a point, but often a line of great length. Any portion of the apex on the course or strike of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title; for while the owner of a vein may follow it in its descent into another's territory beyond his own side lines, he cannot beyond his own end lines, and the vein beyond those end lines is subject to further discovery and appropriation.

Colo. Central Con. M. Co. v. Turck, 50 Fed. 888 (1892), C. C. Ap., 8th Circ. The owner of a claim may follow a vein whose apex lies within the boundaries of his claim on the dip beyond his side lines within the lines of a claim whose owner's title is by mineral patent prior in date to that of the former.

Where a vein upon which a location rests, after being followed for a considerable distance forks, and one fork passes out of the side line so that its outcrop is on an adjoining claim, that part of this fork which outcrops on the other claim, but on its dip is within the lines of the former, does not belong to the owner thereof.

Tyler Min. Co. v. Sweeney, 54 Fed. 284 (1893), C. C. Ap., 9th Circ. The T. Co. applied for patent of Tyler claim. The L. C. Co. protested, and brought suit to determine the right to so much of the surface ground as was included in the locations of both the Tyler and Last Chance claims, being the triangular piece of ground shown on the diagram. The T. Co., after appearing and making defence, withdrew its answer in open court, and judgment was entered for the L. C. Co., reciting the priority of its claim. The T. Co. then left out of its original location the part below the line A B, and brought ejectment against S. for balance. *Held*, that the judgment in the prior suit was not *res adjudicata* as to the priority of the Last Chance location: it was conclusive only as to the right of possession of the triangular piece of ground involved in that suit.



The withdrawal of the answer did not have the effect of changing the Tyler claim to a five-sided figure, so as to destroy the parallelism of the location, or to deprive the T. Co. of the privilege of claiming an end line which left out the ground in dispute in the former suit, or to deprive it of the right to follow the dip of its lode beyond its side lines. A locator may abandon a portion of his original location without forfeiting any rights he may have to the balance of the claim.

The owner of a claim located approximately lengthwise of a lode, and having parallel end lines, may, if the apex passes out of the claim across a side line thereof, follow the dip beyond the side line, the same as if one original end line had been drawn at such crossing parallel to the other end line.

Where a claim is located so that the lode crosses the side lines nearly at right angles, the location is a valid one; but the side lines should be taken as end lines, and the owner has no right to follow the dip beyond them.

When a claim is located along a lode, and its owner's right to follow the dip beyond the side lines conflicts with the right of an owner of a claim located across the lode to the portion thereof actually within these lines, the claim having priority of location should prevail.

Followed and affirmed in *Last Chance Min. Co. v. Tyler Min. Co.*, 61 Fed. 557 (1894). But see s. c. 157 U. S. 683, *post*, p. 460.

Doe v. Waterloo Min. Co., 54 Fed. 935 (1893), C. C. S. D. Cal. The owner of a possessory right to, and a *fortiori* the patentee of, a mining claim holds the land with and subject to the incidents of ownership and possession, subject only to the right of the lawful possessor of another claim having parallel end lines to follow any lode the apex of which lies within his claim, on its dip within the limits of

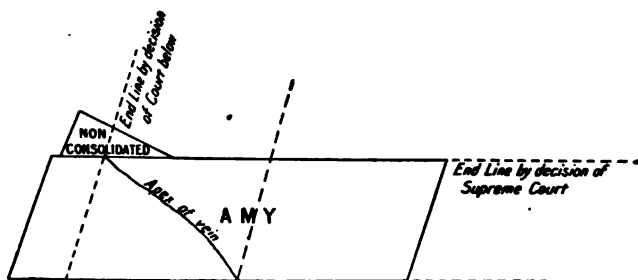
planes vertically projected through such end lines extended. His ownership is not subject to the mining of veins whose apices lie outside his claim by any other than the lawful possessor.

It follows that upon the one claiming the right to mine within the boundaries of another's claim lies the burden of proving his right, which he must do by showing two things: first, such a location as entitles him under the law to follow a vein having its apex within his surface lines; and, second, that the acts of mining done under the surface of his neighbor's claim are upon a vein having its apex in his own claim, which on its dip passes out of his side lines into and beneath his neighbor's claim, and lies between the parallel planes passing through the end lines of his claim extended.

Where the end lines, as fixed and declared in the patent, are parallel, the patentee's right to follow the dip beyond his side lines cannot be defeated by showing that in the original location of the claim the end lines were not parallel. The patent is conclusive on this point.

When the claim as located did not have parallel end lines, but the United States surveyor in making a survey drew in one end line so as to make it parallel with the other, the rejection of such survey by the locator will not deprive his assignee, upon thereafter accepting the survey, abandoning the portion of the claim not included therein, and obtaining a patent in accordance therewith, of his right to follow the dip of his vein.

King v. Amy & Silversmith Min. Co., 152, 222 (1894), reversing s. c. 9 Mont. 543. Two claims were located in the manner shown in the diagram, and the question in issue was the right of the owner of



the Amy to ore taken from the vein after it crossed the lines between the two claims.

Field, J.: "It is evident that what are called side lines of the location, as shown in the diagram, are not such in fact but are end lines. Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than three hundred feet from the middle of such vein. In the Amy claim, the lines marked as side lines, cross the course of the strike of the vein and do not run parallel with it. They, therefore, constitute end lines. It is true the lines are not drawn with the strict care and accuracy contemplated by the statute, and which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments. But,

as was said by this court in *Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U. S. 196, 207: 'If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences.' The court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants under the statute. It cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called *side lines* are in fact *end lines*, the court, in determining his lateral rights, will treat such side lines as end lines, and such end lines as side lines; but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law.

"Acting upon this principle there is no lateral right to the holder of the Amy claim by which he can follow its vein into the Non-consolidated claim. Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made to ascertain, as near as possible, the course and direction of the vein. 'Even then,' the court added, 'with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein, but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subjected to perpetual readjustment according to subterranean developments subsequently made by mine workers. Such readjustments at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims.'

"Applying this doctrine to the case before us, it follows that the vein in controversy, the apex of which was within the surface lines of the Amy claim, did not carry the owner's right beyond the vertical plane drawn down through the north side line of that claim."

Cons. Wyoming Gold Min. Co. v. Champion Min. Co., 63 Fed. 540 (1894), C. C. N. D. Cal. The statute "was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind or character of formation the mineral might be found. It should be so construed as to protect locators of mining claims who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located." "In defining lodes and veins, the text books and several of the decisions speak of them as fissures in the earth filled with quartz in place carrying gold and silver or other minerals. But true fissure veins and lodes often exist and are continuous without having any filling, in certain points or places, of mineral matter. A majority of such lodes have, in addition to the clean fissure filling of mineral, a considerable amount of decomposed wall rock, clay, etc. . . . To constitute a vein, it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and

does exist when filled in places with other matter. The fissure should, of course, have form and be well defined, with hanging and foot walls. Between these walls will be found bodies of quartz, rich or poor, but there is also liable to be found in many places short or long distances between the quartz bodies or pay chutes, where no quartz will be found in the fissure between the walls. Yet the vein exists, and is often as well defined as if the same were filled with quartz. The clay, the selvages, slickensides, striation and ribbing of the walls are frequently as strong evidence of the indication of permanency and continuity as of the existence of the quartz itself."

The Ural lode passed through the northern end line of the claim, and after following a course substantially parallel to the side lines for about fourteen hundred feet crossed the eastern side line about one hundred feet north of the south end line. It was contended that the fact that the lode crossed one of the side lines deprived the owner of the Ural claim of all extralateral rights. It was held by the court, however, that the opinion in the *Amy and Silversmith Case*, 152 U. S. 222, was not susceptible of such construction, and that the owner of the Ural lode was entitled to follow it upon the dip between the northern end line and a line drawn at the point of departure of the lode across the side line, crosswise of the general course of the vein and parallel to the northern end line within the limits of the surface location. "One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines, as marked on the ground as such, then the end lines of the location must be considered by the court as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute."

The act of 1866 did not require end lines to be parallel.

Del Monte M. & M. Co. v. N. Y. & L. C. M. Co., 66 Fed. 212 (1895), C. C. D. Colo. Where the apex of a vein which intersects one of the end lines of the claim passes out of the claim across one of the side lines, the owner of the claim does not entirely lose his right to follow the dip beyond his side lines. He is entitled to so much of the lode on the dip as lies between the end line through which the vein passes and the point of its divergence from the claim.

Last Chance M. Co. v. Tyler M. Co., 157, 683 (1895). The judgment of the court below (54 Fed. 284, *ante*, p. 457) that the judgment in the prior suit was not *res adjudicata* as to the priority of the Last Chance location is reversed and the case remanded for a new trial.

Brewer, J.: "Our conclusions in this respect obviate the necessity of considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that, according to the original location of the Tyler claim, the vein enters through an end and passes out through a side line, while by the

amended location it passes in and out through end lines. Of course, if the latter is a valid location the owner of the claim would unquestionably have the right to follow the vein on its dip beyond the vertical plane of the side line. But if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim extended downward? It has been held by this court in the cases heretofore cited that where the course of the vein is across instead of lengthwise of the location, the side lines become the end lines and the end the side lines; but there has been no decision as to what extraterritorial rights exist if the vein enters at an end and passes out at a side line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law that the owner of real estate owns all above and below the surface, and no more? Or may the court rely upon some equitable doctrine and give to the owner of the vein the right to pursue it on its dip in whatever direction that may go, within the limits of some equitably created end lines?"

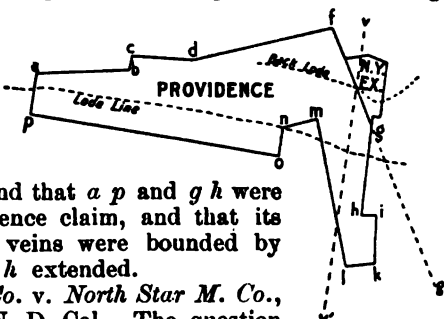
Tyler M. Co. v. Last Chance M. Co., 71 Fed. 848 (1895), C. C. D. Idaho. The question raised in the Supreme Court in the last case is answered by holding that when the outcrop of the vein passes through one end line and one side line, the locator may draw in the other end line to the point of intersection of the vein with the side line and abandon what lies beyond, and he will then have the same extralateral rights as if the claim had been so located in the first instance. And even if the locator does not actually so draw in his end line and abandon what lies beyond, a new end line will be considered as drawn at that point and he will have the same extralateral rights as if the claim had been so located in the first instance.

As the priority of the location of the Last Chance claim has been established, the owner of the Tyler cannot follow the vein on its dip beyond the plane of the north side line of the Last Chance claim.

Colorado Cent. Consol. M. Co. v. Turck, 70 Fed. 294 (1895), C. C. Ap., 8th Circ. A vein recovered by T. in ejectment had its apex in his location, dipped to the north and extended under the C. Co.'s claim, which lay to the north of T.'s claim. T. brought an action against C. Co. for damages for ore taken from this vein. There were certain ore bodies lying south of the vein and under it, and C. Co. had taken ore from these ore bodies. The court instructed the jury that these ore bodies, since they could upon no theory have a separate existence extending through T.'s vein, and giving them an outcrop on C. Co.'s claim, should be regarded as having some connection with T.'s vein which must entitle him to whatever was in them. *Held*, not error.

Walrath v. Champion M. Co., 72 Fed. 978 (1896), C. C. Ap., 9th Circ.; modifying s. c. 63 Fed. 552 (1894), C. C. N. D. Cal. The Providence lode was located and patented under the act of 1866. The New Year's Extension was subsequently patented under the act of 1872. *Held*, the effect of the act of 1872 was to grant to the owners of claims theretofore patented all the veins, lodes, and ledges throughout their entire depth, the top or apex of which were inside of the surface lines extended downward vertically.

The plaintiff claimed that their extralateral rights on the "Back Vein" were bounded by the perpendicular plane drawn through the line $f g$. The defendants claimed as the boundary of these rights the plane drawn through $v v'$, which is parallel to $g h$. The court below found for the defendant.



The Court of Appeals found that $a p$ and $g h$ were the end lines of the Providence claim, and that its extralateral rights as to all veins were bounded by the plane drawn through $g h$ extended.

Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597 (1896), C. C. N. D. Cal. The question of a right to a patent covering several lode claims, which were located before the enactment of any mineral law by Congress, is within the jurisdiction of the Land Department; and after the same is determined, and a patent issued, the boundary lines as defined by the patent are the lines by which the rights of the parties are to be determined, and not the lines of the several claims of which the patented survey is composed.

Where a vein passes through the east end line of a claim and comes to an end before reaching the west end line, the owner of the claim may follow it on its dip between a perpendicular plane drawn through the east end line and a parallel plane through the western terminus of the lode, provided that in no event shall he pursue it beyond a perpendicular plane drawn through the west end line.

Tombstone M. Co. v. Way Up M. Co., 1, 426 (1883). **Arizona.** "If the vein crosses the side lines on its strike, such side lines become the end lines, and terminate the owner's right to follow the vein in that direction."

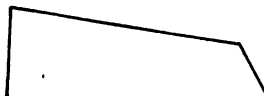
Plaintiff's claim was located in a northwest and southeast direction; defendant's claim adjoined, the northeast side line of the former being one of the end lines of the latter, which extended in a northeast and southwest direction. Plaintiff claimed that a vein or ledge of mineral-bearing rock extended through his claim, substantially parallel with the side lines, and on its dip extended beneath the surface of the claim of defendant, who was extracting ore from it. Defendant claimed that a fissure vein extended through his claim substantially parallel with his side lines, that this vein extended into the plaintiff's claim, and that defendant's shaft was sunk upon this vein. The court, on these facts, found against the plaintiff and denied an injunction.

Brown v. 49 and 56 Quartz M. Co., 15, 152 (1860). **California.** The first locator of a quartz lode is not confined simply to the solid quartz actually embodied in the bed rock, but is also entitled to the loose quartz and rock and decomposed material which were once a part of the lode, and are now detached so far as the general formation of the ledge can be traced. The only question of fact in this case being whether the quartz rock parted from its original connection was a portion of the same quartz lode or claim taken

up by defendant; it was not important whether the rock was upon the surface, or what its condition, provided it was a part of such lode or claim.¹

Eclipse G. & S. M. Co. v. Spring, 59, 304 (1881). "Prior to May 10, 1872, each locator was entitled to one ledge only. Before that time neither could have obtained a patent for more than one. Under the act of Congress of May 10, 1872, a patentee is entitled to all the ledges having their apices within the surface lines of the land granted to him." The act does not affect those who acquired rights or interests in ledges prior to the passage of the act. One to whom a patent for mining land under this act issues takes no title to ledges so located before the act, even though the locators thereof have given no notice of adverse claim as required by the act. This requirement has no application to this class of claimants.

Doe v. Sanger, 88, 203 (1890). The Silver King mine was located as in the diagram. The provision of Rev. Stats. 2320, requiring the end lines of lode claims to be parallel, is merely directory, and no consequence is attached to a deviation from its direction.²



"But sec. 2322, which gives the right to follow veins beyond surface lines, does contain some provisions about that right which are important. By that section a vein can be followed outside of the side lines only, and not outside of the end lines. And so a surface location might be made in such an irregular and many-sided shape as to destroy the right to go beyond the surface lines.

"That consequence, however, would not be because the end lines were not exactly parallel, but because it would be difficult, if not impossible, to tell which were side lines and which were end lines."

"If a location is made in substantial compliance with the intent of the statute, — that is, where there are two side lines running along the course of the vein, and two shorter end lines running across it, so that the two sets of lines are distinct and apparent, — such a location is not void, but gives the right to follow a vein laterally, although the original end lines may not be exactly parallel, or although they may differ from a true parallel as much as they did in the case of the Silver King." "The statutes of Congress, except so far as they provided for patents, were little more than mere formal legislative declarations of what had before rested in unwritten consent."

Patterson v. Hitchcock, 3, 533 (1877). If a located lode terminates or departs from the side line at any point within the location, the location beyond such point is, before patent, defeasible, if not void. In ejectment for land contained within such location, evidence is admissible that the located lode did not extend into the land in controversy.

Wolfey v. Lebanon M. Co. of N. Y., 4, 112 (1878). Act of Congress, July 2, 1866, sec. 2, clearly permits the patentee of a lode claim to follow the lode in its descending course to any depth, although in its downward trend it is carried into the adjoining land.

¹ It will be noticed that this was before the act of 1872.

² See *Horswell v. Ruiz*, 67 Cal. 111 (1885).

The central idea of a mining location is that there must be a discovered lode within it, whose *locus* in its onward course or strike is embraced by its boundaries. The surface ground and the lode are not independent grants. It is not the purpose of the acts to grant surface ground without a discovered lode. The lode is the principal thing, and the surface ground incident thereto. A lode claim is to be fixed by reference to the plat or survey of the location; on its onward course or strike the lode may not depart from the lines of location. If it does so, the patentee may not follow it beyond the lateral boundaries as against one who has subsequently located and patented it.

If the patent is broader than the law, it is to that extent ineffectual. The claimant is required to file in the Land Office a diagram of his vein or lode. Before he prepares this diagram, he should so far develop his lode as to be able to trace its course. If the surveyor does not cover the lode, the patentee may not shift his lines so far as to include it. The error is his mistake, not that of a government officer.

Johnson v. Buell, 4, 557 (1879). To the extent that a lode in its onward course or strike departs from the side lines of the patented location, plaintiff in ejectment cannot recover. *Wolfley v. Lebanon M. Co.* followed.

Armstrong v. Lower, 6, 393 (1882). One who has made a proper and valid location of a lode claim is entitled to the presumption that his lode extends the full length of his claim. A subsequent and conflicting locator, who sets up that the lode does not extend to the conflicting premises, has the burden of proving this.

Armstrong v. Lower, 6, 581 (1883). This case explains the last proposition above (last case), as follows:—

There must be some proof of the position of the lode with reference to the location, some evidence, however slight, that the strike of the vein is in the direction of the location. This proof establishes, *prima facie*, the position of the vein where it has not been traced; in other words, the jury are to infer that the vein extends throughout the location which, when valid, is laid out along the course of the vein as discovered.

Colo. M. Ry. Co. v. Croman, 16, 381 (1891). "The rights of the miner to the surface ground of his location are dependent upon his discovery, and upon the relation which the vein, in its course and direction, bears to the surface as it has been located. The grant of the vein has always been held to be the principal thing, and the surface but an incident, which, as to its extent, is entirely determined by the course of the principal thing granted, to wit, the vein."

Where a petitioner in condemnation proceedings desires to avail himself of this principle, and to avoid the payment of damages on the ground that the claims whose surface is taken were located across the strike of the vein, it is incumbent on him to establish the fact.

Iron Silver M. Co. v. Campbell, 17, 267 (1892). In an action to recover possession of mining property, a patent is *prima facie* evidence of plaintiff's right to mineral beneath the surface, and the burden of proving that he was following the dip of a vein whose apex was in the defendant's claim, lay on him. The *prima facies* were not changed by the fact that plaintiff, in his complaint, anticipated the

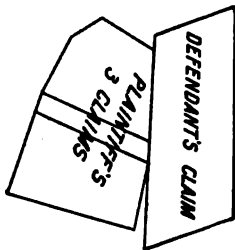
defence, and made certain allegations as to the mineral formations beneath the claims.

Duggan v. Davey, 26 N. W. R. 887 (1886). In an action to restrain defendants from mining within plaintiff's lines it was set up that they were following a vein which had its apex on their own claim. The burden of proving this is on defendants. This is equally the case whether plaintiff's title was a mere possessory right, or one derived by patent from the government.

Apex and *outcrop* are not synonymous. A vein may outcrop below the apex by an exposure of a portion of it on the line of its dip. "The word 'apex' ordinarily designates a point, and so considered, the apex of a vein is the summit, the highest point in the vein in the ascent along the line of its dip or downward course, and beyond which the vein extends no farther, so that it is the end, or reversely the beginning, of the vein. The word 'top,' while including 'apex,' may also include a succession of points, that is, a line — so that by the top of a vein would be meant the line connecting a succession of such higher points or apices thus forming an edge."

Gilpin v. Sierra N. Con. M. Co., 2, 662 (1890). On bill to Idaho. enjoin him from working a vein on plaintiff's claim, defendant alleged that he was working on the dip of a vein having its apex on his claim.

It appeared that plaintiff sunk a shaft near his eastern line, in ledge matter consisting of various substances, including some ore. Following the dip, deflecting to the south one hundred and fifty feet he struck defendant's underground workings. The ledge matter was continuous and the ore was of a kind sometimes found in "blanket veins," and it was doubtful if the vein was a fissure vein. The dip was nearly at right angles with the north side line of plaintiff's claim, and deflected little, if at all, from the course of defendant's ledge. All the defendant's tunnels were on the bed rock or floor of the ore deposits, rose slightly as they receded from their mouths, and pursued an almost due westerly course. The mouths were at an outcrop of a deposit nearly horizontal in position on a mountain side. The dip of the floor of the deposits was from north to south. A temporary injunction was issued.



Burke v. McDonald, 29 Pac. 98 (1892). Court was asked to instruct the jury as follows: "A lode, within the meaning of the statute, is whatever the miner could follow and find ore. Under the requirements of the law a valid location of a mining claim may be made whenever the prospector has discovered such indication of mineral that he is *willing* to spend his time and money in following with the expectation of finding ore; and a valid location of a mining claim may be made of a ledge deep in the ground and appearing at the surface, not in the shape of ore, but in vein matter only."

This was *held* to be correct, and it was error to modify it by changing "willing" to "justified."

Burke v. McDonald, 33 Pac. 49 (1890). Beatty, C. J.: "Every seam

or crevice in the rock, even though filled with clay, earth, or rock, does not constitute a vein, or every ridge of stained rocks, its cropping. Nor, on the contrary, is it required that well defined walls shall be developed, or paying ore found within them. But something must be found in place, as rock, clay, or earth, so colored, stained, changed, and decomposed by the mineral elements as to mark and distinguish it from the enclosing country. While the contents of ore-bearing veins widely differ, there is that indescribable peculiarity in the 'ledge matter,' the matrix of all ledges, by which the experienced miner easily recognizes his ledge when discovered."

Montana. Foote v. National M. Co., 2, 402 (1876). "A lead or lode is not an imaginary line without dimensions; it is not a thing without shape or form, but before it can legally and rightfully be denominated a lead or lode it must have length and width and depth; it must be capable of measurement; it must occupy defined space and be capable of identification. Before a quartz claim can be legally located, a lead or lode containing gold or silver must be discovered, and before such discovery can be called a discovery, at least one well defined wall or side to the lode must be found. What, then, is a quartz lode? It is a fissure or seam in the country rock filled with quartz matter bearing gold or silver. This fissure may be wide or narrow; it varies in width from one inch or even less to one hundred feet or much more. The sides of a lead are represented and defined by the walls of the country rock, and these walls must be discovered and the lead identified thereby, before it can be located and held as a lead."

Pardee v. Murray, 4, 234 (1882). Possession of the surface of a lode claim is possession of all veins, lodes, and ledges whose tops or apices are within such surface lines, and possession of such surface protects all such veins, lodes, and ledges from the operation of the Statute of Limitations. No adverse possession could become operative by sinking a shaft to such a vein outside of the surface boundaries, on what was claimed as another location. In such case the statute would begin to run only from the time that it became known to the prior locator that the adverse claimant has entered into possession of a vein whose apex was within the former surface boundaries.

Driscoll v. Dunwoody, 7, 394 (1888). Trespass for ore taken from a certain vein. Plaintiff proved title to a surface claim within whose vertical planes the vein was. Defendants offered to prove that the apex of the vein was in another claim. This was proper testimony, and was properly rebutted by testimony that the apex was within lines of plaintiff's claim. This was not an action involving title to real estate. The question was one of boundary.

Blue Bird M. Co. v. Murray, 9, 468 (1890). Plaintiff, in following its vein on the dip and beyond the side lines of its claim, worked within the limits of defendant's claim. An injunction had been granted restraining defendant from working upon plaintiff's mining claim, and afterwards, on defendant's motion, an order was made, permitting him to prosecute certain specified work within his own boundaries under certain restrictions and the control of the court, for the purpose of obtaining evidence for the trial of the case, and the ascertainment and

determination of the rights of the parties and the continuity and identity of the veins, and to prosecute development and other work pending litigation.

Held, this order was within the powers of an equity court, and, being in effect an order for an inspection and survey for the discovery of the truth, was not an abuse of judicial discretion.

One who in mining enters the side lines of the location of another is *prima facie* a trespasser.

King v. Amy & Silversmith Con. M. Co., 9, 543 (1890). "A vein, to the miner, is a body of ore, quartz or mineral-bearing substance lying within the crust of the earth, bounded on each side by the country rock, greatly varying in width and extending in length across and through the country for greater and less distances. The direction of the vein so across and through the country is called the 'strike.' The direction of the vein as it goes downward into the earth is called the 'dip.' The dip, in different veins, and in the same veins sometimes, varies from a perpendicular to the earth's surface to an angle perhaps only a few degrees below the horizon. The dip is spoken of from three different points of view.

"1. As to its inclination from a perpendicular or a horizontal, as so many degrees from the perpendicular or from the horizontal. . . .

"2. As to the direction it takes from the strike or apex, by the points of the compass. If the strike were due east and west, and the vein in its course downward departed from the perpendicular at an angle so that a perpendicular shaft sunk at the apex would leave the vein to the north of such shaft, the dip in this point of view would be said to be due north or, the conditions reversed, due south. In this respect the dip — that is, the direction of the dip — is said to be and is at right angles to the strike.

"3. The dip is again spoken of as the portion of the vein successively encountered in going down and away from the apex. The miner follows the dip when he works downward, leaving the apex further from and above him at each advance. He follows the strike when he works lengthwise of the vein on a level."

1, 2, and 3 are called by the court respectively the "inclination dip," "the compass dip," "the practical dip."

"This word 'dip' is not used in the act of Congress (Rev. Stats. 2322) above cited. The expression there is 'downward course.' 'Dip' is the miner's word, which has attained the signification above defined."

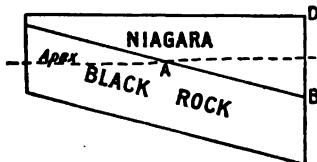
"The intent of the statute is to give the miner a section or block of the vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location, and of a depth as far as he desires, or is able to work downward, and that at the most remote depth attained he shall have the same number of feet on the strike as he had at the apex."

"The intent of the statutory grant of section 2322 is that the miner may follow his vein on the dip, but not on the strike, if it departs from the parallelopipedon indicated."

When the vein departs from the side lines upon its strike, the miner is not limited by the side lines as end lines, beyond which he cannot go upon the dip of the vein. In such case he may still follow the vein

on its downward course outside of his side lines; but he is limited therein by planes drawn throughout the point at which the vein leaves the side lines, and parallel with the end lines.¹

Fitzgerald v. Clark, 17, 100 (1895). The Niagara and Black Rock were contiguous claims, situated as indicated in the diagram. The



vein on its strike passed through the west end line of the Black Rock, crossed its north side line into the Niagara, and passed out of the Niagara through its east end line. The vein dipped to the south. The owner of the Niagara was

entitled to follow the vein on its dip between its end line D B and a line parallel thereto through A, the point at which the vein crossed the side line on its strike.

The opinion in this case contains a remarkable criticism of *King v. Amy & Silversmith M. Co.*, 152 U. S. 222, *ante*.

Nevada. Jones v. Prospect Mt. T. Co., 31 Pac. 642 (1892). A patent does not convey veins within its boundaries extended vertically downward whose apices are outside such boundaries. The presumption in the first instance is that the owner of a claim owns all the veins found within his boundaries; but when there is evidence tending to prove that the vein in controversy has its apex outside these lines, this, if sufficient, will rebut the presumption, and the burden of proving ownership is then on the person alleging it. *Bell v. Skillicorn* (N. Mex.), 28 Pac. 768, dissented from. "A certain formation, which the defendant claimed to be the ledge, had been traced on its inclination outside the plaintiff's boundaries, and a large amount of work there done upon it. If this was the ledge, as the defendant claimed, it tended to show that its apex was outside of those boundaries. According to the witnesses it consisted of broken limestone, boulders, low grade ore, gravel, and sand, which appeared to have been subjected to the action of water. This was found at a depth of several hundred feet, and where there seems to have been no question that it was within the original and unbroken mass of the mountain. So far as was shown, the rock on either side was fixed, solid, and immovable. Mineral matter so situated, no matter when it was originally formed or deposited, is 'in place' within the meaning of the law. The manner in which mineral was deposited in the places where it is found is, at the best, but little more than a matter of mere speculation; and to attempt to draw a distinction based upon the mode or manner or time of its deposit would be utterly impracticable and useless." Bigelow, J.

New Mexico. Bell v. Skillicorn, 28 Pac. 768 (1892). Plaintiff in ejectment gave evidence of title under patent, and that defendants had entered within his lines and taken ore therefrom. The defence was that defendants, being owners of an adjoining claim, had followed their lode on the dip under plaintiff's claim. *Held*, plaintiff had made out a *prima facie* case, and the burden lay on

¹ This conclusion is reversed by the Supreme Court of the United States in quotations from the opinion seem unacceptable. (See diagram.)

defendants to prove that they were following a lode which had its apex outside of plaintiff's claim and belonged to them.

Illinois Silver M. & M. Co. v. Raff, 34 Pac. 544 (1893). "While what constitutes an apex and a vein are questions of law, the existence of either or both present questions of fact to be passed upon in each case, as it arises, under the law applicable to the state of facts as established."

The ore in this case occurred in shoots, veins, gashes, and pockets connected by stringers in a zone of lime; overlying this zone of lime was a non-mineral wall of shale. It was proper to leave the question of the existence of a vein or of an apex to the jury, with proper instructions as to the definition of these. "There may be a contact, and yet no contact vein. The mineral may be exposed at a point upon one claim, and followed continuously under the surface from this point to another property, through an undisputed vein between clearly defined hanging and foot walls, and still the point at which the mineral is exposed not be the apex of the vein, which may have an apex ten miles distant, or may have no apex at all. It would be the height of foolishness for a court in New Mexico, with our mineral-bearing lime formation extending with the different mountain ranges from Colorado to Old Mexico, to say that mineral cannot be found in lime at a thousand feet depth or on the surface, with a cap of slate or a contact of porphyry. One of these lime belts, zones, or masses may be mineral-bearing throughout its length and breadth in one certain locality, or in various places, and the body, mass, or zone bearing the mineral dip into the earth on all sides under mountains of granite, with no apex to the vein, or mass distinguishable to the naked eye or discoverable by the ingenuity of the prospector. The zone or mass may follow the undulations of a broken country down into the valley, and rising over the divides, cutting through, covered by, or overlapping other formations; but until it is broken, and the edge exposed, or some edge or end as a beginning point found, from which it can be followed down at some angle below the horizontal, there is no apex from which it can be followed beyond the side lines of a claim located upon it."

Blake v. Butte S. Mining Co., 2, 54 (1877). Under the law Utah.

as it stood prior to May 10, 1872, each locator was entitled to but one vein; but under the act of Congress of that date he is entitled to all veins having their apices within his surface lines. A patent to a mining claim, issued upon an application made under the act of 1866, grants the government title to the surface ground mentioned therein, subject to the right of other locators to follow veins or lodes held under locations made prior to May 10, 1872. The owner of such a vein being in possession thereof has a right to follow it within the patented surface ground of another. The act of 1872 does not impair his right, and he is not bound to file adverse claims to protect it.

Kuhn v. Old Telegraph M. Co., 2, 174 (1878). A patent to a mining claim passes whatever title the government had to the surface, and any vein or veins beneath not otherwise granted. A location is not void because by subsequent development it might prove to be on the dip of a section of a lode previously located. The question would

then arise between the claimants, and the older claimant might or might not insist on following his lode as he chose. Before he does so and the second locator is ousted, the last claim would be patentable as mineral land containing a lode.

McCormick v. Varnes, 2, 355 (1880). The notice of a location is presumed to refer to the surface as well as to the vein located; if the latter is held by the notice, the location must be along the general course or strike of the vein.

The act of 1866 did not authorize the creation of two separate estates, one in the surface, the other in the vein. The location is made on the surface, and should be made along the course of the vein or lode. The locator only secures so much of the lode or vein as it actually covers. If he mistakes the course of the lode and locates his surface across it, he cannot claim that part of the vein not covered by his surface. The right to follow the vein outside of his side lines applies only to the dip of the vein when on its downward course it departs from the side lines; he may not follow the vein when it departs from his side lines on its strike or onward course.

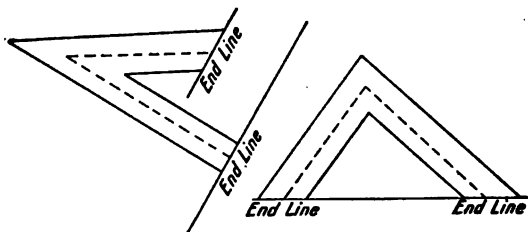
Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co., 11 Pac. 515 (1886). Under the act of 1872 the discoverer of any part of the apex of a lode is entitled to its entire width, despite the fact that a portion of its width may be outside of the surface side lines extended down vertically. While he has no right to the extralateral surface, he has a right to the extralateral lode beneath the surface.

The Eureka Company located its claim along the length of a lode which, however, at one end widened out so that a portion of the width of its apex was outside of the side lines, within the surface of a claim afterwards located by the Bullion Company. The former company was held to be entitled to the entire lode. That portion in the ground of the latter company was not to be treated as a separate lode.¹

LAND OFFICE DECISIONS.

As copper and cinnabar are found in "rock in place" rather than in the form of placers, parties desiring to obtain patents for lands valuable on account of deposits of cinnabar or copper must enter the same as lode claims. *Copp*, 83 (1871).

The statute contemplates a lode location to be substantially a parallelogram. "It must not vary largely from that figure, for such material



variance involves conditions which, in a greater or less degree, according to circumstances which at the date of location and patent even are most frequently unknown quantities, conflict with the theory of the law, render uncertain the property rights of adjoining owner or owners in the vicinity, and, in a patent which should convey the

ory of the law, render uncertain the property rights of adjoining owner or owners in the vicinity, and, in a patent which should convey the

¹ See *ante*, page 442.

property in that form which will at least render an application of the law to its use possible, result in rich and apt material for litigation." The claim must be contained between parallel end lines indefinitely extended. The preceding forms are illegal, and will not be approved by the Land Department.

"If the topography of the country does not permit the claimant to take under the law all he claims, yet he must abide by the law." Copp, 276 (1880).

A location is not objectionable which runs northeasterly 875 feet measured along the line marked "centre of vein," thence southeasterly at a right angle with its former course 450 feet, thence northeasterly parallel with its original course 175 feet, the underlying mineral being found as "a comparatively level deposit, irregular in form, in no wise resembling a fissure vein, and not capable of being traced by its outcroppings." "I fail to perceive any reasonableness in the requirement of a parallelogrammic form. If a fissure vein deviates literally at an angle, it is reasonable, as the primary purpose of the statute is to grant the mineral, that the location should deviate with it. If the mineral is not deposited in a fissure, but in irregularly shaped masses, as in this instance, then, as it can in no wise affect the interests of either the United States or adjoining locators whether any given L-shaped lot be covered by one or two locations, it is unreasonable to hold that it shall not be embraced by one location." "There is no language in the act," says the court in *Wolfley v. Lebanon M. Co.* (4 Colo. 112), "that requires the diagram to be in the form of a parallelogram or in any other particular form." I will go further and say that the language of the statute precludes the conclusion that it contemplated a parallelogrammic form." Secretary Teller, in *Breece M. Co.*, 3 L. D. 11 (1884).

The surface right is an adjunct of the lode claim, and cannot extend beyond the point where the lode intersects the exterior line of a senior location, and in such case the end lines of the survey will be required to be readjusted. *Plevna Lode*, 11 L. D. 236 (1890).

In the survey of a lode claim that conflicts with a prior valid claim that is excepted from the application, the applicant's right does not extend beyond an end line passing through the point where the lode intersects the exterior line of the senior location, and a new survey readjusting the end lines will be required. *Consolidated M. Co.*, 11 L. D. 250 (1890).

While mill sites are sold under the mining laws (Rev. Stats. 2337), yet they are disposed of as "non-mineral land," and the provision of Rev. Stats. 2336, relative to the priority of title upon the intersection of two or more veins, has no application to mill sites, which have been patented and lie across, and separate lode claims in two parts. A lode claim that is divided into two parts by an intersecting patented mill site must be confined to that part which contains the discovery shaft and improvements. *Andromeda Lode*, 13 L. D. 146 (1891).

A mineral entry may be allowed of a tract divided by a patented intersecting lode claim, if the lode in the tract applied for, crosses the lode of the patented claim. *Patten Extension Lode*, 15 L. D. 133 (1892).

In case of a mineral entry that is in conflict with a prior agricultural pre-emption claim, the land embraced in said entry which lies beyond the point where the lode intersects the boundary of the pre-emption claim must be excluded from the survey. *Bi-metallic Min. Co.*, 15 L. D. 309 (1892).

A mineral entry will not be allowed for a lode claim that includes land embraced in a senior location, or is intersected by a mill site which is excluded. The exclusion of the mill site is an admission that the land contained in it is *non-mineral*, and therefore conclusive that the lode does not extend throughout the claim. *Michael Howard*, 15 L. D. 504 (1892).

A lode claim was so located that it was intersected by a prior placer claim, and therefore consisted of two non-contiguous parts. An entry could be sustained only for the part containing the discovery, and was held for cancellation as to the other part. The lode claim ends at the point where the lode on its strike intersects the exterior boundary of the placer.¹ *Silver Queen Lode*, 16 L. D. 186 (1893).

B. Cross and Uniting Veins.

Veins having their apices in different claims frequently intersect or unite: in the first case, simply crossing and having the space of intersection in common; in the second, becoming one vein below the point of union. This gives rise to a conflict of rights, which is determined by Rev. Stats. 2336, upon the general principle that priority of location gives the better right.

Rev. Stats. 2336: "Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." The last sentence of this section applies only to uniting of veins on the dip, not to veins uniting on the strike.

Cross lodes are of course those which intersect on the strike.² The question naturally arises as to the definition of the phrase

¹ This probably proceeds on the same reasoning as the former decision, in this case the conclusion being that the land covered by the placer location was not open to lode location. *Quere*. Should not the lode applicant be permitted to prove that the lode which he claims does extend

through the territory covered by the placer claim, and thus bring himself within the decision of *Patten Extension Lode*, 15 L. D. 133?

² But see *Wilhelm v. Silvester*, 101 Cal 358, *post*.

“space of intersection.” The question of priority of title can arise only where two locations cross. The senior locator has already, by Rev. Stats. 2322, been given title to all veins, lodes, and ledges the tops or apices of which are inside of his surface lines. It would follow that to preserve his rights the space of intersection given to him by Rev. Stats. 2336 must be the intersection of the cross lode with his claim; that is, that part of the cross lode included within his side lines. It is so construed in Montana and Arizona.

In Colorado, however, the space of intersection is held to be that included within the walls of the intersecting veins, not the whole of the vein within the lines of the senior location. The grant of the latter section is thus an exception out of the grant of the former. It has been very properly said in regard to this construction:—

“To give any part of the space of intersection to the holder of the later location would be to take from the older location something already granted to it. To create an exception out of his grant as he originally takes it under act of Congress, would require in the wording of the act expressions as strong as are required to create an exception in a deed. An exception is equivalent to the reconveyance of land already conveyed. A right of way is not an exception, but a reservation which may be inferred from any wording indicating an intention to create an easement. It takes nothing from the body of the grant of the first locator, but compels the first locator to use or hold his grant or claim subject to a right or privilege of the junior or overlapping claimant, of reaching the end of his claim by passage through the senior location.”¹

Through the space of intersection, however defined, the junior locator has a right of way for the purpose of excavating and taking away the mineral contained in his vein.

For the purpose of determining the question of priority, a possessory title by location is as good as a patent; but where the intersection is known, the senior locator, in order to preserve his rights, must file an adverse claim to the junior locator's application for a patent, in order that an exception may be made therein of the space of intersection.

¹ Morrison's Mining Rights, p. 93.

United States. *Little Josephine M. Co. v. Fullerton*, 58 Fed. 521 (1893), C. C. Ap., 8th Circ. Plaintiff owned two claims, the veins of which united below the surface, and at a greater depth met the vein of defendant's claim, which had been located after the plaintiff's older claim. In ejectment for the vein below the point of meeting, the only issue being whether the veins united or crossed, it was immaterial whether plaintiff's junior location was prior or subsequent to defendant's location.

Arizona. *Watervale M. Co. v. Leach*, 33 Pac. 418 (1893). The Black Eagle claim was a valid mining claim, located in 1882. The Big and Little Comet claims were located three years later. The owners of the latter claimed the right to follow their vein on the strike into the territory of the former, claiming that it was an intersecting vein, and that the owner of the Black Eagle was only entitled to so much as actually intersected the Black Eagle vein. *Held*, he was not entitled to do so. Rev. Stats. 2322 gave the owner of the Black Eagle the right to all veins whose apices were within his boundaries. This right is not abridged by Rev. Stats. 2336. This section only relates to the actual space of intersection, viz., "That body of ore bounded by the foot and hanging walls of one lode extended in the general course of that lode, and the foot and hanging walls of the intersecting lode extended upon its general course," and has no relation to any part of the vein outside of that space.

California. *Champion M. Co. v. Consolidated Wyoming G. M. Co.*, 75, 78 (1888). Veins having their apices in two adjoining claims, the question of priority of location arose under Rev. Stats. 2336. For the purpose of determining this question a possessory title under the general mining customs and laws of the State and United States on the subject is as good as a patent. Here one claimed by such a title which, however, was found to date from 1879, while the other had a patent dated 1874. The title of the latter prior to 1874 was therefore immaterial. But it seems that to prove such a title, preliminary proceedings and papers in the United States Land Office are not admissible. The junction of the two veins being unknown at the time, the owner of one would not have had any standing as an adverse claimant in the Land Office, and is not concluded by the proceedings there.

Stinchfield v. Gillis, 96, 33 (1892), followed in s. c. 107, 84 (1895). G., claiming to be the owner of a certain mining claim of which he had been in possession for many years, conveyed a part to S. It appeared that G. had never located his claim, and after the conveyance S. located what had been conveyed to him. A vein which had its apex in S.'s claim intersected one having its apex in G.'s claim. G. was estopped from denying that he had located the whole claim previous to his conveyance to S., and consequently S. had a right to the mineral contained in the space of intersection.

The size of an intersecting vein is immaterial upon the question of the legal rights attached to ownership. It is entitled to those rights, however small, if it is a genuine mineral vein.

Wilhelm v. Silvester, 101, 358 (1894). A junior locator whose claim and lode intersect the claim and lode of a senior locator has no right

~~To take~~ ore from that part of the former lode whose apex is within the senior ~~location~~. Rev. Stats. 2322 governs the latter's rights. The majority of the court ~~were of opinion~~ that the provision of Rev. Stats. 2336 is only applicable to the protection of ~~old lode locations~~ made prior to the passage of the act of 1872 and to cases of veins which cross upon the dip.

Beatty, C.J., concurred in the decision, but was of opinion that Rev. Stats. 2336 was applicable to veins located after 1872 and crossing on the strike, but the apices of which are in claims whose surfaces do not conflict. This is a result which may happen from the inclination of the veins. "The practice of miners in making, and of the Land Office in permitting, cross locations on the surface is without any justification in the mining law."

Branagan v. Dulaney, 8, 408 (1885). Where a junior location crosses a senior location, the former will have a way of necessity through the older location, for the purpose of excavating and taking away the mineral contained in the cross veins, and upon a grant of the cross vein itself such a right of way passes as an incident.

Rev. Stats. 2336 is to be construed as entitling the senior location to the space of intersection of the vein only. While section 2322 would give the senior locator a right to cross lodes, the last section in order of arrangement controls the question.

Lee v. Stahl, 9, 208 (1886). "Under sections 2322, 2336, Rev. St. U. S., when a junior mining location crosses a senior location, and the veins therein are cross veins, the junior locator is entitled to all the ore found on his vein within the side lines of the senior location except at the space of intersection of the two veins. In such case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross veins."

The effect of section 2336 is to exclude a cross lode, except at the point of lode intersection, as not a subject of grant. It follows that the right to it is not lost by failure to adverse.

"But this does not include the space of lode intersection. If a prior locator would secure this and other rights which he has by virtue of his prior location, he must adverse, and this whether his prior location was made under the act of 1866 or 1872. It is true that section 2344 provides that 'nothing contained in this chapter shall be construed to impair in any way, rights or interests in mining property acquired under existing laws.' While this is true, other sections of the act provide the mode and manner in which such rights shall be asserted and secured by adversary proceedings, and a failure so to assert prior rights is treated as a waiver."

The policy of the law is to require all rights and equities to the premises sought to be purchased and patented to be adjusted prior to the issuance of the patent, to the end that it may be impregnable against all comers.

Morgenson v. Middlesex Mining Co., 11, 176 (1887). When a junior mining location crosses a senior location, and the veins therein are cross veins, the junior locator is entitled to all the ore found on his own vein within the side lines of the senior location, except at the

space of intersection of the two veins; and the junior locator in such case has a right of way for the purpose of excavating and taking away the mineral contained in the cross vein. In an action to recover the value of ores alleged to have been taken from plaintiff's claim, defendant may show that the vein from which he took them was his own vein, which crossed that of the plaintiff.

Lee v. Stahl, 13, 174 (1889). "It is not the doctrine of this court that section 2344 *ex proprio vigore* operates to reserve out of the grant other rights acquired prior to the passage of the act of 1872, but that it secures the protection of such rights at the time of the issuance of the patent to those who avail themselves of the adverse procedure prescribed by the act itself." The provision in section 2336, that "where two or more veins unite, the oldest or prior location shall take the vein below the point of intersection, including all the space of intersection," applies not to the uniting of veins on the strike or horizontal extension, but upon the dip or downward course. In the former case prior rights must be preserved by adverse claim. The crossing of lodes does not mean the crossing of two patents, but the actual crossing of two veins themselves.

Pardee v. Murray, 4, 234 (1882). In case of cross veins **Montana.** the prior locator is entitled to all the ore within the space of intersection, but the subsequent locator has a right of way only through the space of intersection of the claim. If the latter should take ore therefrom, he would be liable in trespass.

LAND OFFICE DECISIONS.

A mineral entry may be allowed of a tract divided by a patented intersecting lode claim, if the lode in the tract applied for crosses the lode of the patented claim. *Patten Extension Lode*, 15 L. D. 133 (1892).

II. PLACER CLAIMS.

The placer mining claim had its first congressional recognition in the act of July 9, 1870. The term "placer," as used in congressional legislation, includes "all forms of deposit, excepting veins of quartz or other rock in place." Rev. Stats. 2329. Accurately defined placers are superficial deposits which occupy the beds of ancient rivers. The above definition is, however, prescribed by Congress, and accords with the usage of the miner. The law divides all mineral deposits into (a) *lodes or veins*, and (b) *placers*, the former forming an accurately defined class, and the latter including all other deposits. A placer claim is ground within defined boundaries containing valuable deposits usually not fixed in rock but in a loose unconsolidated state (gravel beds, etc.), so that the mineral may in most cases be collected by simple washing or amalgamation without milling.

If land answers this description, *i. e.* contains valuable mineral deposits in loose earth, sand, or gravel, the requirement of the government will be satisfied; the land may be located as placer land whatever incidental advantages it may offer to the locator.

Placer claims are subject to entry and patent under like circumstances and conditions and upon similar proceedings as lode claims, but where the lands have been surveyed by the United States the entry in its exterior limits must conform to the legal subdivisions. Rev. Stats. 2329. This does not relieve the locator of the duty of marking his location on the ground. He may not merely post a notice referring to legal subdivisions. Such conformance, however, is only requisite where reasonably practicable. If it can be shown that the nature of the ground is such as to make it impracticable, as when the deposit is in a cañon with precipitous banks, the location can be made by survey conforming to the shape of the land.

By Rev. Stats. 2331 it is provided:—

“Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.”

The details of location are treated of in the foregoing chapters.¹

Several placer claims may be included in one application for a patent, and the owners of several placer claims may unite in an application. The nature of the ground *as placer ground* must be shown to the satisfaction of the Land Department before a patent will issue. A patent will not issue if it is evident that the real purpose of the application is to obtain the ground for other purposes than placer mining,—as, for instance, a water right.

¹ The location of placer claims in Idaho is regulated by Act March 2, 1897, p. 12.

The rights of the owner to the minerals under a placer claim are the same as those of any other owner of the soil. All the minerals belong to him which lie within the vertical planes drawn through his boundaries and the centre of the earth, except such as form part of veins whose apices are outside of his claim. Outside of these planes he can take nothing.

As to his rights as regards lodes which have their apices within his boundaries, see *post*, Div. III., this chapter.

The uncertainty as to how lands chiefly valuable for building stone and oil lands should be entered, has been resolved by the acts of Congress of Aug. 4, 1892,¹ and Feb. 11, 1897, which provide that such lands may be entered as placer mining claims.²

United States. *St. Louis Smelting Co. v. Kemp*, 104, 636 (1881). A defendant in ejectment claimed adversely to the title to a placer mining claim, derived from a patent of the United States bearing date March 29, 1879, which described by metes and bounds the premises, containing one hundred and sixty-four acres and sixty one-hundredths of an acre, more or less. *Held*, that he could not put in evidence the proceedings in the Land Department, for the purpose of showing that the patent was issued upon a single application, including several mining locations, some made after the passage of the act of July 9, 1870, Rev. Stats. 2330, limiting the location of one person or an association of persons to one hundred and sixty acres, and others made after the passage of the act of May 10, 1872, Rev. Stats. 2331, limiting a location to twenty acres for each individual applicant.

A patent issued subsequently to the passage of the said act of 1870 may embrace a placer mining claim consisting of more than one hundred and sixty acres, and including as many adjoining locations as the patentee had purchased. The proceedings to obtain a patent therefor are the same as when the claim covers but one location.

Tucker v. Masser, 113, 203 (1885). A patent for a placer mining claim composed of distinct locations, some of which were made after 1870, and together contain over one hundred and sixty acres, is valid. *Smelting Co. v. Kemp*, 104 U. S. 636, was carefully considered, and again affirmed.

United States v. Iron S. M. Co. 128, 673 (1888). See this case on page 487, *post*.

California. *Gregory v. Pershbaker*, 73, 109 (1887). "In the *Eureka Case*, 4 Sawy. 302, Mr. Justice Field, of the Supreme Court of the United States, said: 'We are of opinion that the term [lode] as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within the boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel,

¹ See Land Office Circular of Oct. 12, 1892, 15 L. D. 360, and Instructions, 23 L. D. 322. as to the kind of deposits which should be properly located as such, the classification at the end of the Geological Preface.

² See further as to placer claims, and

all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.' This definition would not include a bed of gravel from which particles of gold may be washed. The words 'mineralized rock' were evidently intended to qualify the last, as well as the first, sentence."

"In Soane's Newman and Barretti (by Valazquez) a 'placer' is said to be 'a place near the bank of a river where gold dust is found.' In the last edition of Webster, which gives the meaning of the term as approved by usage in Mexico and California, it is defined: 'a gravelly place where gold is found, especially by the side of a river or in the bed of a mountain torrent.' Whatever the origin of the subterranean channels containing gravel beds, they have long been known to exist in California, and they have been generally supposed to be, and generally spoken of, as the beds of ancient rivers in which the gravel was deposited by fluvial action, and which were either from their beginning subterranean, or upon which the superincumbent earth or rock has been hurled by means of convulsions caused by volcanic or other natural force. That the bed of gravel mentioned in the findings, to the limited extent it had been prospected by the intervener's tunnel, 'descends or drops on an average about eight degrees,' does not of itself make the gravel deposit a lode with 'a top or apex,' nor contradict the theory that the channel was the channel of a mountain stream or torrent.

"The terms employed in the acts of Congress are used in the sense in which they are received by miners. Moreover, by express enactment, 'claims usually called placers' are declared to include all forms of deposits 'excepting veins of quartz or other rock in place.' (Rev. Stats., sec. 3229.)"

There being no local customs as to the location of placers as tunnel claims, an occupancy by tunnel, if it could be considered at all under the statutes, would extend only to the space within the walls of the tunnel, and could not be extended beyond them by any rule of constructive possession.

White v. Lee, 78, 593 (1889): In locating a placer claim by legal subdivisions on surveyed ground, it is necessary to mark the lines of the location. It is not sufficient merely to post a notice referring to the legal subdivision.¹

Rosenthal v. Ives, 12 Pac. 904 (1887). A custom limiting Idaho placer claims to eighty rods in length is reasonable and in entire harmony with the spirit of the law.

Moxon v. Wilkinson, 2, 421 (1876). The act of the Montana Legislative Assembly, May 8, 1873, Stats. Ex. Sess. 83, is not applicable to placer mining ground. "In the language of miners, a lode is a vein containing ore. Veins are narrow plates of rock intersecting other rocks, and are the fillings of cracks or fissures. The placers are superficial deposits which occupy the beds of ancient rivers or valleys. . . . A vein or lode of valuable deposits does not include a placer mining claim."

There being no territorial law requiring the recording of a placer

¹ To the contrary, *Reins v. Murray*, 22 L. D. 409 (1896).

claim, a record of such claim, situated in no mining district, in the office of the county recorder, is no evidence of title.

Freezer v. Sweeney, 8, 508 (1889).¹ The term "placer claim" in the Revised Statutes includes quarries of rock valuable for building purposes, which may accordingly be located as such.

The laws of the United States make no requirement as to the recording of placer claims; the law of the Territory requires the recording of them (Gen. Laws, div. 5, sec. 1477). There is no law of the United States or the Territory requiring the owner of a placer claim, when applying for a patent, to designate the particular use or character of his claim. If it is a placer claim, he is entitled to all the mineral deposits therein, except such veins or lodes as are described in Rev. Stats. 2320. If the record of the location contain words of description of the use or purpose of the claim, they do not abridge the owner's right. Such a claim was recorded as a placer mining or stone quarry claim. Upon a subsequent locator making adverse claim to an application for a patent, the original locator will not be limited to the location of a stone quarry.

McDonald v. Montana Wood Co., 14, 88 (1893). One discovery is sufficient to hold the placer location of one hundred and sixty acres by an association. It is not necessary to make a discovery in each tract of twenty acres.²

LAND OFFICE DECISIONS.

Auriferous cement claims, found in what are sometimes called ancient river beds, and usually worked by the hydraulic process, should be located as placers. Copp, 83 (1872).

Lands containing borax deposits should be located as mineral land. Proceedings required to be the same as for placer claims. Copp, 100 (1873).

Under Rev. Stats. 2331, the location of a placer claim upon surveyed land should embrace legal subdivisions, where the same can be done without interfering with the rights of other *bona fide* claimants in the same tract. Upon unsurveyed land, or where by reason of other *bona fide* claimants a legal subdivision of surveyed land cannot be embraced in the application, a survey should be made in accordance with the circular instructions of the Land Office. Copp, 115 (1873).

Where a placer claim is situated upon surveyed lands and conforms to legal subdivisions, no survey or plat is required. Copp, 124 (1873).

Several owners of divided or undivided interests in placer mining ground may unite as an unincorporated association in an application for a patent. Copp, 180 (1875).

While the patent for a placer claim excepts from its operation all lodes and veins known to exist at the date thereof, without naming or describing them, yet if owners of lode claims have by protest warned

¹ In *Wheeler v. Smith*, 32 Pac. 784 under the mining laws; but see now the act of Congress of Aug. 4, 1892, and the act of Congress of Aug. 4, 1892, and the circular of Oct. 12, 1892, 15 L. D. 360.

D. 1 (*ante*, p. 200), it is held that since the Stone and Timber Act of 1878 has been enacted, stone quarries may not be located L. D. 568.

the Department of the existence of such claims, the surveyor-general will be instructed to exclude them from the survey, and if they are found by him to exist, they will be excluded from the patent by metes and bounds. *Olathe Placer*, Copp, 287 (1880).

Deposits of fire clay or kaolin are properly the subject of a placer, and not of lode location. *Dobbs Placer Mine*, 1 L. D. 565 (1883).

Rev. Stats. 2329 to 2331 should be construed to require placer claims upon surveyed lands to conform to the legal subdivisions only where reasonably practicable. It is impracticable to so conform a claim where the deposit is in a cañon with precipitous banks, the adjoining land on both sides being unfit for mining or agriculture.

A placer location may include the bed of an unnavigable stream, and the locator has a usufruct therein. *William Rablin*, 2 L. D. 764 (1884).

Where an application for patent embraces a placer location properly made and assigned to applicant, and also additional ground claimed by virtue of a relocation by himself of the original location enlarging its boundaries, such additional ground must not exceed the amount of twenty acres. *Joseph M. Knapp*, 2 L. D. 763 (1883).

Where it is evident that an application for a placer claim is in fact an attempt to secure a patent for a water right, the application will be rejected. *William A. Chessman*, 2 L. D. 774 (1883); *Robert S. Hale*, 3 L. D. 536 (1885).

The requirements of the statute that a claim upon surveyed land must conform to the legal subdivisions as nearly as practicable, must be construed to mean that such claims must conform to the survey as nearly as reasonably practicable.

It is the intention of the mining laws generally to permit persons to take a certain quantity of land fit for mining, and not compel them to take such a quantity irrespective of its fitness for mining. *Pearsall & Freeman*, 6 L. D. 227 (1887).

The official plat and field-notes of survey of a placer claim on surveyed land may be properly required where it is impracticable to accurately designate the land included within such claim. *G. A. Khern*, 6 L. D. 580 (1888).

A tract containing a valuable deposit of mineral paint rock in place is not subject to entry as a placer claim.

This would constitute it a lode claim, if at all a mineral claim within the meaning of the law; but it is for twenty acres of land, which amount could be taken only as a placer claim. *Charles A. Barnes*, 7 L. D. 66 (1888).

An examination of a placer claim and report thereon, by a deputy mineral surveyor, at the expense of the applicant for patent, should not be required where the claim is upon surveyed land and in conformity with legal subdivisions. *R. T. Gerhauser*, 7 L. D. 390 (1888).

A placer application will not be allowed if the evidence does not show as a present fact the placer character of the land involved. *Searle Placer*, 11 L. D. 441 (1890).

Land chiefly valuable for deposits of building stone may be entered as placer mining claims under act of Aug. 4, 1892. *Minnekahta Stone Mine*, 15 L. D. 256 (1892).

Land containing deposits of sandstone of a superior quality for building, monumental, and other purposes may be entered as a placer claim. This case is distinguished from *Conlin v. Kelly*, 12 L. D. 1, in that there the equities were with the agricultural claimant, and the stone was useful only for general purposes and of little commercial value, "while in this case the stone is not only useful for those purposes, but also very valuable for the ornamentation of buildings, and for monumental and other commercial purposes." *McGlenn v. Wienbroer*, 15 L. D. 370 (1892); *Van Doren v. Pleased*, 16 L. D. 508 (1893).

A placer location made prior to the act of Aug. 4, 1892, of land chiefly valuable for a deposit of glass sand and building stone is not a legal appropriation, and a subsequent intervening homestead entry of another will defeat the right of the placer claimant to perfect his claim under said act. *Florène D. Delaney*, 17 L. D. 120 (1893).

A placer location for building stone which fails because unwarranted by law when made, cannot be validated by a subsequent discovery of some other material that is subject to entry as a placer. *Clark v. Ervin*, 17 L. D. 550 (1893).

There must be a discovery on each twenty acres in the placer claim of one hundred and sixty acres made by an association. *Ferrell v. Hoge*, 19 L. D. 568 (1894);¹ *Louise M. Co.*, 22 L. D. 663 (1896); *Union Oil Co.*, 23 L. D. 222 (1896).

III. LODES IN PLACERS.

Placer land often contains the apices of lodes or veins within its boundaries. Such of these as are unknown at the time of the application for a patent become the property of the patentee; those known at that time are his only upon application therefor. The provision of Rev. Stats. 2333 in reference thereto is as follows:—

"Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer

¹ To the contrary, *McDonald v. Montana Wood Co.*, 14 Mont. 88.

claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

Three distinct classes of cases are here provided for, as described by Mr. Justice Miller, in *Reynolds v. Iron Silver Mining Co.*, 116 U. S. 687, *post*.

In determining the rights of a patentee under this section, it becomes important to define when such a vein is "known to exist." If the applicant has knowledge of the existence of the vein, he is within the meaning of the statute; but the knowledge must be actual. Mere belief in the existence of a vein, though gained after examination, is not such knowledge. Where a lode claim has been located, its boundaries marked as required by law, and certificate recorded in accordance with the district regulations, the lode so covered is known to exist,¹ although the applicant for a patent of a placer claim may not have personal knowledge thereof.

On the other hand, location of the vein is not a requisite to knowledge of its existence. A vein is known to exist if it is known to the applicant, or to the community generally, or if it has been disclosed by workings, and is obvious to any one who makes a reasonable and fair inspection of the ground. If, however, the locator of a lode claim, after repeated attempts to disclose a lode, in good faith abandons his location, relocates the ground as a placer claim, obtains a patent therefor, and veins are subsequently discovered therein, they are not "known to exist" within the meaning of the act. To meet that designation, they must be clearly ascertained. Indications of their existence by outcropping upon the surface do not justify it. They must be known to contain minerals to such an extent and value as to justify expenditure for the purpose of working them.

By the terms of the statute an application which does not include known lodes is construed to be a conclusive declaration

¹ In addition, however, it must be shown that the vein is valuable. The mere location, therefore, of a lode claim does not establish its exception from a placer patent.

that the applicant has no right of possession of such lodes. It follows that they are not conveyed by the patent, but remain part of the public domain. One claiming to own such a lode need not therefore file an adverse claim to the placer application. And a subsequent application by the owner of the lode for a patent will be entertained by the Land Office. The decisions of the Land Office holding the contrary (*Rebel Lode*, 12 L. D. 683; *Pike's Peak Lode*, 14 L. D. 47; *South Star Lode*, 17 L. D. 280) have been overruled in *South Star Lode*, 20 L. D. 204. Patents for placer claims contain exceptions of known lodes in general terms. If such lodes are defined before the Department, they are specifically excepted.

If a patent issues for a placer claim without such specific exceptions, it will be presumed that there were no known veins within its limits at the date of the application. This presumption can only be overcome by clear and convincing proof to the contrary. In such a case it must be shown not only that a vein which might have been located existed, and was known to exist, but that it contained minerals in such quantity and of such quality as, under the circumstances then existing, would have justified expenditure for their extraction.

When a patent has issued for a lode within a prior placer patent, it is not conclusive of the fact that the lode was known to exist at the date of the application for the placer patent when there is nothing on the face of the latter to show that the question was contested and adjudicated in the Land Office. The discovery of a quartz lode outside the boundaries of a placer raises no presumption of its extending within those lines, nor does the granting of the patent for the lode claim subsequently to the granting of the placer patent raise a presumption that the lode was known to exist.

The date of application is the time at which the knowledge of the vein's existence must be had in order to except it from the grant.

Where a vein or lode is excepted from a placer patent its owner is not limited to twenty-five feet on each side thereof, but is entitled to the full width of his location. This limitation only applies to veins or lodes which are claimed by the placer applicant.

Sullivan v. Iron Silver M. Co., 109, 550 (1883), **United States.** reversing *Iron S. M. Co. v. Sullivan*, 16 Fed. 829, C. C. D. Colo. In an action by the patentee of a placer claim to recover possession of a vein or lode within its boundaries, an answer alleging that the vein or lode was known and was claimed to exist at the time of applying for the patent, which fact was known to the patentee, and was not claimed in his application; that the defendant had located this lode subsequently to the date of the patent; and setting forth the terms of the patent by which known lodes were excepted, well pleads the fact which under Rev. Stats. 2333 precludes him from having any right of possession of the vein or lode.

Gray, J.: "The phrase 'claimed to exist,' as used in the amended answer, apparently intending to follow the form of patent therein set forth, is not indeed a statement that a claim for the vein or lode had been in due form made and located, but only that it was contended that the vein or lode existed. But the further allegation in the answer, that the vein was known by the patentees to exist at the time mentioned, is an allegation in the very words of the statute itself, of the fact which the statute declares shall be conclusive against any right of possession of the vein or lode claim in a claimant of the placer claim only. Whether the words 'known to exist' as used in the statute, are satisfied by actual knowledge of the applicant, or imply also a located claim for the vein or lode, the same meaning must be attributed to them in the amended answer; and the fact signified by the statute is well pleaded."

It had been decided in the court below that a vein or lode that had never been located or marked out by metes and bounds, and on which there had been no actual development, was not within the intention of the statute, whether it was known to anybody, or even to the patentee, that there was such a vein within the limits of the placer grant.

Reynolds v. Iron Silver Mining Co., 116, 687 (1886). Where a vein or lode is known to exist under the surface included in a placer patent, and is not in claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the patentee, who thereby acquires no interest in such vein or lode. The title remaining in the United States in the veins thus known to exist and not claimed or referred to in the patent, the patentee and his grantee have no right to dispossess any one of the peaceable possession of such veins, whether the latter have any title or not.

Congress intended to provide for three distinct classes of cases: —

"1. When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim, he shall state that fact, and on payment of the sum required for a vein claim and twenty-five feet on each side of it at \$5 per acre, and \$2.50 for the remainder of the placer claim, his patent shall cover both.

"2. Where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof.

"3. Where the applicant for the placer patent is not in possession

of such lode or vein within the boundaries of his claim, but such vein is *known to exist*, and it is not referred to or mentioned in the claim or patent, then the *application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim.*

"It is this latter class of cases to which the one before us belongs.

"It may be easy to define the words '*known to exist*' in this act. Whether this knowledge must be traced to the applicant for the patent, or whether it is sufficient that it was generally known, and what kind of evidence is necessary to prove this knowledge, we need not inquire," for the knowledge of the patentee has been found as a fact.

"Lodes and veins known to exist when the patent was asked for should be excluded from the grant as much as if they were described in clear terms."

Iron S. M. Co. v. Reynolds, 124, 374 (1888). Plaintiff's complaint alleged that he was the owner and in possession of a tract of mining land described by metes and bounds, and known as the Wells and Meyer placer claim, and that while he was thus owner and possessor defendant entered upon a portion of it and wrongfully ousted him therefrom. Defendant denied these allegations, and set up that at the times named he was the owner and in possession of two lode mining claims known as the Crown Point and Pinnacle lodes, and that in working and following them he entered underneath the exterior surface lines of the placer claim, and had not otherwise ousted plaintiff, and that these two lodes were known to exist at the time of the application for plaintiff's patent, and were not included in it. Plaintiff's replication traversed these defences, and further set up that at the times named he was owner and in possession of two claims known as the Rock lode and the Dome lode immediately adjoining the Crown Point and Pinnacle lodes, and that within their boundaries there was a mineral vein or lode, which, on its dip, entered the ground covered by these claims, and that any portion of any vein or lode developed underneath the surface of the Crown Point and Pinnacle lodes was part of the Rock and Dome lodes. On these pleadings plaintiff at the trial, in addition to the patent of the placer claim, which was admitted without objection, offered in evidence a patent for the Rock and Dome lodes, and a deed of them to him, to show that the lode which, since the issue of the patent for the placer claim, had been ascertained to dip into the boundaries of that claim, had its apex within the boundaries of those lode claims. The court refused to admit this evidence.

Held, that this was error, as the facts thus offered to be proved, if established, would force defendant from his position of intruder without title, and compel him to show prior title to the premises in himself, or to surrender them to the plaintiff.

In the trial of an issue whether the applicant for a patent of a placer claim knew at the time of the application that there was also a vein or lode included within its boundaries within the meaning of Rev. Stats. 2322, an instruction to the jury, that "if it appear that an application for a patent was made with intent to acquire a lode or vein which may exist in the ground beneath the surface of a placer claim, a patent issued upon such application cannot operate to convey such lode or

vein," and that "that intention could be formed only upon investigation as to the character of the ground and the belief as to the existence of a valuable lode therein, which would amount to knowledge under the statute," is erroneous.

Field, J. : "The statute speaks of acquiring a patent with the knowledge of the existence of a vein or lode within the boundaries of the claim for which a patent is sought, not the effect of the *intent* of the party to acquire a lode which may or may not exist, of which he has no knowledge. Nor does it render belief, after examination, in the existence of a lode, knowledge of the fact. There may be a difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference."

Noyes v. Mantle, 127, 348 (1888), affirming *Mantle v. Noyes*, 5 Mont. 274, *post*. Field, J. : "The section can have no application to lodes or veins within the boundaries of a placer claim which have been previously located under the laws of the United States, and are in possession of the locators or their assigns ; for such locations, when perfected under the law, are the property of the locators, or parties to whom the locators have conveyed their interest."¹ "It is not, therefore, subject to the disposal of the government. The section can only apply to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned, and are known to exist, the applicant for the patent must include them in his application, or he will be deemed to have declared that he had no right to them." "Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode."

United States v. Iron S. M. Co., 128, 673 (1888), affirming s. c. 24 Fed. 568. A bill to cancel placer patents alleged that they were obtained upon false and fraudulent representations that the land was placer mining ground, containing no lodes or veins and that applicant had performed work required for placers, whereas the ground in fact contained sundry veins or lodes, etc., which were well known to the patentee at the time of his application, and the work required to enter the land as placer had never been performed. The record showed that the applicant for a patent had sought for lodes before he took out a placer patent ; that he made several excavations and lode locations ; that upon examination by others whom he sought to interest in the enterprise, they stated that the formation of the ground was such that it did not contain lodes, and advised him to take up the land as placer ; that the United States surveyor had found that there had not been discovered any mineral-bearing rock in place. The applicant therefore abandoned his lode locations, and located the ground as placers.

¹ But see *Valley Lode*, 22 L. D. 317 ; *Wilson Creek C. M. & M. Co. v. Montgomery*, 23 L. D. 476.

Field, J.: "By the term 'placer claim,' as here (secs. 2329, 2333) used, is meant ground within defined boundaries which contains minerals in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling.

"By 'veins or lodes,' as here used, are meant lines or aggregations of metal imbedded in quartz or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock. Yet a lode may, and often does, contain more than one vein."

"It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploration. Although pits and shafts had been sunk in various places, and what are termed in mining cross-cuts had been run, only loose gold and small nuggets had been found mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal, were not disclosed when the application for the patent was made. The subsequent discovery of lodes upon the ground, and their successful working, does not affect the good faith of the application. That must be determined by what was known to exist at the time. It was not, therefore, a fault to be charged upon Sawyer that he abandoned his original lode locations after he had discovered that they were worthless, in order to make locations of placer claims. There was evidence that loose gold existed in the sand and gravel on the ground in many places, and had been washed from the earth; and it was the judgment of experienced miners that if water could be brought from a neighboring creek, the ground could be successfully worked as placer ground."

"If the land contains gold or other valuable deposits in loose earth, sand, or gravel which can be secured with profit, that fact will satisfy the demand of the government as to the character of the land as placer ground, whatever the incidental advantages it may offer to the applicant for a patent."

Dahl v. Raunheim, 132, 260 (1889), affirming *Raunheim v. Dahl*, 6 Mont. 167, *post*. This was an action to quiet the title to certain placer mining ground. The plaintiff asserted title under a location of the ground as a placer claim by parties from whom he purchased it. The defendant asserted title to a portion of the ground as a lode claim under a location made subsequently to the location of the premises as placer mining ground, and subsequently to the application by the plaintiff for a patent therefor. The court held that when a person applies for a placer patent in the manner prescribed by law, and all

the proceedings in regard to publication and otherwise are had thereunder which are required by the statutes of the United States, and no adverse claims are filed or set up, and it appears that the ground has been surveyed and returned by the surveyor-general to the local land office as mineral land, the question whether it is placer ground is conclusively established, and it is not open to litigation by private parties seeking to avoid the effect of the proceedings. But he may set up that there is a lode in the claim which was known to exist at the time of the application. This question is properly left to the jury. "The discovery by the defendant of the Dahl lode two or three hundred feet outside of these boundaries does not, as observed by the court below, create any presumption of the possession of a vein or lode within these boundaries, nor, we may add, that a vein or lode existed in them." An applicant for a placer patent who has complied with all the proceedings essential for the issue of a patent, but to whom patent has not issued, may maintain an action to quiet title against a person asserting title to a portion of the placer location under a subsequent location of a lode claim.

Dahl v. Montana Copper Co., 132, 264 (1889), affirming *Montana Copper Co. v. Dahl*, 6 Mont. 131. Same point as in last case, which is followed.

Iron Silver M. Co. v. Campbell, 135, 286 (1890). A lode patent, issued subsequently to the issue of a placer patent of a tract within whose metes and bounds the lode patent is located, is not conclusive evidence that the lode was so known at the time of the issue of the placer patent as to authorize the issue of the lode patent, there being nothing on the face of this patent to show that there was any contest before the Land Department on the question of the existence of the vein and the knowledge of it.

Iron Silver M. Co. v. Mike & Starr G. & S. M. Co., 143, 394 (1892). In ejectment, plaintiff claimed under a placer patent issued Jan. 30, 1880, on an application made Nov. 30, 1878, and entry and payment on Feb. 21, 1879. Defendant claimed under location of a lode on Feb. 1, 1879. He had in 1877 run a tunnel which intersected the vein in question.

If a vein is not known at the time of application for a placer patent, but is discovered after application and before entry and payment, it passes by the patent. In this case it was found that the vein was discovered before application.

The term "known vein" is not synonymous with "located vein." "It is enough that it be known, and in this respect, to come within the intent of the statute, it must either have been known to the applicant for the placer patent or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government." In this case an inspection would have disclosed the existence of the tunnel, and an examination of the tunnel would have revealed the vein. The applicant for a placer patent is chargeable with all that would be disclosed by a casual inspection of the surface of the ground or of such a tunnel.

Field, Harlan, and Brown, JJ., dissent.

Sullivan v. Iron Silver M. Co., 143, 431 (1892). The date of application for a placer patent, and not the date of patent, is the time at which a vein or lode must be known in order not to pass by the placer patent.

In order to except it, the existence of the vein must be actually known. Mere speculation and belief, based not on any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had uncovered horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory, is not the knowledge required by the law.

Montana Cent. Ry. Co. v. Migeon, 68 Fed. 811 (1895), C. C. D. Mont. The requisites of a known lode under Rev. Stats. 2333 differ from those which will justify a location under Rev. Stats. 2320. "Before a patent for a placer claim can be cancelled or modified upon application of a ledge claimant, the latter must establish by clear and convincing proof that at the date when the application was made for patent to the placer claim, either that such placer applicant knew, or might have known by reasonable inspection, inquiry, or diligence, or that the community generally knew, that a mineral-bearing ledge of rock in place existed within the limits of such placer claim; that such ledge was valuable for its minerals, which were in such quantity and of such quality as under the then existing circumstances would justify expenditure for the purpose of extracting them; and that more than merely indications of a mineral-bearing ledge must have then existed."

The presumptions are all in favor of the validity of a placer patent as against a lode claim located subsequently to its issuance upon a part of the same ground; and where the patentee files an adverse claim against the application for patent of the lode, and brings an action in support thereof, the burden is upon the lode claimant to overcome those presumptions, and to show by clear and convincing proof that the vein upon which the lode claim was located was a known vein at the time of the application for the placer patent.

The fact that the placer claim included part of a previously located lode claim, which had not been forfeited, cannot be considered in a collateral attack on the placer patent by a subsequent locator of a lode claim upon part of the same ground.

California. Clary v. Hazlett, 67, 286 (1885). Plaintiff applied for a patent of a tract as a placer claim. The tract had, to the knowledge of the plaintiff, a lode of gold-bearing quartz, of which no mention was made in the application. The patent issued contained the reservation, "That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these presents." This was held to be authorized by the Rev. Stats. 2333, and no title to the quartz lode vested in the plaintiff. Under the law he gained by his application no right of possession thereof, and consequently had no right to a patent.

Montana. Mantle v. Noyes, 5, 274 (1885), affirmed in *Noyes v. Mantle*, 127 U. S. 348, ante. "There is a vast difference between a vein or lode, and a vein or lode mining claim. A

vein or lode may be entirely concealed beneath the earth's surface and unknown to exist, while a lode mining claim is on the surface exposed to view, designated by stakes and monuments so that its boundaries may be readily traced, besides a notice posted on the claim and a record of the location in the proper county. By the terms of the statute (Rev. Stats. 2333), it is a vein or lode in a placer claim, the existence of which is not known, that the placer patent carries with it. There is no provision in the statute which authorizes the placer claimant to acquire title to a lode mining claim by virtue of his placer patent. If the lode mining claim is known to exist, the placer applicant must also apply for a patent for such lode mining claim. He acquires no title to the lode claim by virtue of, his placer claim, and if he makes no application for the lode claim he is conclusively presumed to have no right to or interest in it. The theory of the statute is that a vein or lode of quartz may exist in placer ground, that is unknown, because it may be concealed beneath the surface, and afterwards uncovered by working the placer claim; but no such presumption can arise as to a lode mining claim, which must exist on the surface and be distinctly marked and bounded, so that the same may be designated and distinguished from all other property. A lode mining claim is a definite, distinct, and certain tract or parcel of land, the same as is a farm or a town lot, and a location according to law and the record thereof is the title by which it is held and owned. The location of a quartz lode mining claim, perfected according to law, creates an existing outstanding grant of the exclusive right to the possession and enjoyment of all the surface ground included within the boundaries of the claim, and such a location is just as much a withdrawal from the public domain of the right to the possession of the property located as is the fee withdrawn by a valid grant from the United States under the authority of law."

A patent to one person for a portion of the mineral lands of the United States already sold by the government to another person is void, and the knowledge of the patentee does not affect the matter one way or another. And so, whether the appellant knew of the P. S. mining claim or not, he could not have any title to such mining claim by virtue of his placer patent.

A. having discovered a lode, and duly and legally located a claim thereon, B. subsequently obtained a patent for a placer claim for ground including A.'s lode claim. As to that ground it was void, and it was not necessary that A. should have filed a protest or adverse claim to B.'s application. He did not own or claim any interest in the placer ground, and B. could acquire no interest in his ground by virtue of his placer patent.

Montana Copper Co. v. Dahl, 6, 131 (1886), affirmed in *Dahl v. Montana Copper Co.*, 132 U. S. 264, *ante*. An applicant for a patent to a placer mining claim is entitled to a quartz lode within its boundaries not known to be there at the time of making the application. One who locates such a lode after the expiration of the period of publication of the application of the placer claimant acquires no rights as against him.

Raunheim v. Dahl, 6, 167 (1886), affirmed in *Dahl v. Raunheim*,

132 U. S. 260, *ante*. Where an application for a patent to a placer claim is made, a subsequent locator of a quartz lode within the boundaries thereof must file his adverse claim thereto within the period prescribed by law, otherwise he is debarred from questioning the validity of such placer location.

A patentee of a placer claim is entitled to the possession of a quartz lode within the boundaries of his claim, of whose existence he had no knowledge at the time of his application.

Brownfield v. Bier, 15, 403 (1894). Ground having been located as a lode claim in 1875, was subsequently abandoned and located in 1880, and patented in 1881, by the same persons as placer land. *Held*, that the vein, although known as a vein prior to the placer application, was not shown to have been known to contain minerals of such extent and value as to justify expenditure for the purpose of extracting them. It was therefore not such a vein as is excepted from the placer grant.

LAND OFFICE DECISIONS.

While the patent for a placer claim excepts from its operation all lodes and veins known to exist at the date thereof, without naming or describing them, yet if owners of lode claims have by protest warned the Department of the existence of such claims, the surveyor-general will be instructed to exclude them from the survey; and if they are found by him to exist, they will be excluded from the patent by metes and bounds. *Olathe Placer*, Copp, 287 (1880).

Where the existence of a vein or lode in a placer claim is not known at the date of application for patent, then the patent should convey all valuable mineral and other deposits within the boundaries thereof, even though a vein be known to exist therein before patent issues. *War Dance v. Church Placer*, 1 L. D. 549 (1883).

Where application is made for patent for a lode claim within the limits of a patented placer claim, and it is accompanied by affidavits that the patentee of the placer knew of the existence of the vein at the date of his application, the Land Department cannot pass upon the question. The placer claimant must file his adverse claim, and the controversy be determined in a court of competent jurisdiction. *Robinson v. Roydor*, 1 L. D. 564 (1883).

Where an applicant for a placer patent files a relinquishment of the ground covered by an adverse claim of a lode claimant, he is entitled to a patent for the rest of his claim. *Becker v. Sears*, 1 L. D. 577 (1883).

J. applied for patent for a placer claim. Subsequently M. applied for patent for a lode claim, the surface of which conflicted with J.'s claim. J. filed an adverse claim, began suit on the same, and then voluntarily dismissed the suit. This was held to be a sufficient waiver of claim to the entire width applied for to authorize the issue of patent to the lode applicant, and to be an abandonment of so much of the alleged placer ground as conflicts with the lode claim. *Monroe Lode*, 4 L. D. 273 (1885).

The claimant for an alleged known lode must apply for patent in the usual way, notwithstanding the existence of a prior patent for the

placer including it, in order that the patentee may file the usual adverse claim, and that the parties may then litigate the controversy in the courts. *Olathe Placer Mine*, 4 L. D. 494 (1886).

A vein or lode known to exist at the date of application for a placer patent, and not included in the application, must be excluded from the placer entry. The formal location of a lode claim is not necessary to exclude it from a placer patent, the only requisite being that it was known to exist, and was not included in the placer application. A hearing will be directed to determine whether the lode was known to exist. *Railroad Lode v. Noyes Placer*, 9 L. D. 26 (1889).

To exclude a lode or vein from a placer claim it must appear that a valuable mineral deposit exists, in vein or lode formation, and that it was so known to exist prior to, or at the date of, the placer application. *Largey v. Black*, 10 L. D. 156 (1890).

The limitation of the width of a lode within a placer claim, by the provisions of Rev. Stats. 2338, is only applicable where the claimant seeks a patent for a vein or lode included within the boundaries of his placer claim, and has no application to a lode claim properly perfected by another prior to the date of the application for placer patent. If it appears from the record that there is a lode claim within the boundaries of a placer claim not owned by the placer applicant, such lode claim should be to its full extent excepted from the placer patent. *Pike's Peak Lode*, 10 L. D. 200 (1890).

Where a patented placer is found to be in conflict with a lode claim, and the facts are, or might be, such as to warrant judicial proceedings for the vacation of the patent as to the land in conflict, the patentee may, by mesne conveyance, surrender the title of such land to the government, and so vest the Department with jurisdiction to again dispose of the land. *Juniata Lode*, 13 L. D. 715 (1891).

Application for lode and placer claims having been filed for the same ground, and adverse claims being filed by both parties, the court found that the lodes existed in the placer claim and extended clear through that part in conflict with the lode claim, and rendered judgment that the placer claimants are entitled to patent for all the surface ground, and the lode claimants to the lodes or veins throughout their entire length. The Land Department refused a patent to the placer claimant for all the surface ground, but ordered a hearing to determine whether known lodes existed in the placer ground. *Apple Blossom Placer v. Cora Lee Lode*, 14 L. D. 641 (1892).

"It seems clear that the placer patent is sought for the purpose of securing title to this land, not for placer mining, but for the lodes contained therein. Nothing is clearer than that the proprietor of the placer claim regards the property as valuable because of the tin it contains. He knew of the existence of this tin ore before he applied for the placer patent, but whether he knew it or not, it was known in 1883, and has been known since. The tin does not appear in the form of placer, but is found in veins and lodes. The placer claimant is already owner of several of these lode claims, procured through purchase, and all or nearly all of the assessment work that has been done on the placer claim has been done in the way of quartz mining and prospecting." Said placer entry should be cancelled. *Grosfield v. Nigger Hill Con. M. Co.*, 14 L. D. 685 (1892).

When it has been ascertained by inquiry instituted by the Land Department, or has been determined by a court of competent jurisdiction, that a lode claim existed within the boundaries of the land covered by the placer patent, and that such lode claim was known to exist at the date of the application for patent, and was not applied for, the land embraced in the lode claim is reserved from the operation of the conveyance by the terms thereof, and patent should issue for the lode if the law has been in other respects fully complied with. *South Star Lode*, 20 L. D. 204 (1895); *Butte v. Boston M. Co.*, 21 L. D. 125 (1895).

After the issuance of a placer patent the Department cannot assume that a known lode existed within the placer at the date of application merely because a conflicting lode location antedates the placer location. *Valley Lode*, 22 L. D. 317 (1896); s. c. on review, 22 L. D. 713 (1896).

The discovery and location of a placer claim establishes the owner's right to the possession of the area within its boundaries for placer mining purposes, but does not operate to give title to veins or lodes within its limits, or preclude the right of discovery and location thereof by others. An application for a placer patent which does not include any lodes, does not cover a lode within its boundaries which has been discovered and located by a stranger prior to the application. And the applicant will not be permitted to amend his application so as to include such a lode. *Aurora Lode v. Bulger Hill & N. G. Placer*, 23 L. D. 95 (1896).

The mere location of a lode claim is not constructive notice of its existence. The discovery of a *valuable* vein within its limits is necessary, and must be shown to except it from the operation of a placer patent. *Wilson Creek C. M. & M. Co. v. Montgomery*, 23 L. D. 476 (1896).

IV. TUNNEL CLAIMS.

An especial class of claims arises from the running of tunnels, either for the development or the discovery of mines. The rights acquired by the owner of such a tunnel are defined by Rev. Stats., sec. 2323 :—

“Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel, of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.”

Under this section the tunnel owner becomes entitled only to the veins or lodes discovered by him in the tunnel itself within three thousand feet of its face and on the line thereof. The face of the tunnel is the first working face formed in the tunnel, the point at which it first enters cover. L. O. Regs., par. 22.

The extent of the rights of the claimant to lodes discovered, and as against subsequent locators, is not clear, the act having been construed in various ways.

(a) By the construction most favorable to claimants it is held that the right of possession, to the same extent as if discovered from the surface, is a right to fifteen hundred feet along the length of the lode and three hundred feet on each side thereof, and that *any* location thereon by another made subsequently to the commencement of the tunnel, and which conflicts therewith, must give way. Under this construction the line of the tunnel may be in effect three thousand feet wide.

(b) Although the weight of authority supports this construction, it is not universally recognized, and especially in the earlier adjudications the phrase "line of the tunnel" is held to mean only the space between the walls thereof. Locations, therefore, made after the commencement of the tunnel, but outside of the line as thus defined, though they cover lodes subsequently discovered in the tunnel, do not give way thereto. But lodes discovered in the tunnel may, under this construction, still be located to the same extent as if discovered from the surface, *provided* there is no conflict with locations outside of the line of the tunnel previous to the discovery, though subsequent to the commencement of the tunnel.

This much is certain: all locations made upon the line of the tunnel, as narrowly defined, after work has begun and when the vein does not appear on the surface or is not known to exist at the date of the tunnel location, are invalid. Locations made within fifteen hundred feet of the line of the tunnel on either side of it are of doubtful validity.

In Colorado, the tunnel claimant is limited to two hundred and fifty feet each way on each lode,¹ and in Montana to three hundred feet.²

¹ M. A. S. 3141. This was held to be repealed in *Enterprise M. Co. v. Rico Aspen Con. M. Co.*, 66 Fed. 200.

² Comp. Stats. 1887, 5th div., sec. 1488. Doubt is thrown on the validity of these provisions by the court in *Ellet v. Campbell*, 18 Colo. 510.

Veins which appear on the surface, or which were previously known to exist, are not affected by the rights of tunnel claimants. *They are confined to unknown blind lodes.*

While a tunnel site is treated as a claim, there is no provision for obtaining a patent therefor, but it may be made the subject of an adverse claim for the protection of its line and rights. And a failure to file an adverse claim against an application for patent for a lode claim across the line of the tunnel, and to begin suit thereon, is treated in the Land Office as a waiver of the claim as to the particular lode in conflict. But the obligation to file an adverse claim does not exist in the case of a lode discovered in the tunnel after the application for patent.

The *lodes* discovered in a tunnel may, however, be patented, to attain which end they must be regularly located, and \$500 worth of labor must be expended for each lode claim patented. Labor upon the tunnel and money expended thereon may, by the provisions of the act of Feb. 11, 1875 (amendment to Rev. Stats. 2324), be taken and considered as expended as annual labor on the lodes for whose development the tunnel is run. So, it may be inferred, the expenditures necessary to obtaining a patent may be made in the same way. But no specific amount of work is required to hold a tunnel claim.¹ It is only prescribed that the work shall be prosecuted with due diligence.

The method of locating tunnel claims is set out in L. O. Regs., pars. 20-26.²

United States. *Glacier Mt. S. M. Co. v. Willis*, 127, 471 (1888). Ejectment will lie for a tunnel site and the lodes cut in it by a general description.

Lamar, J.: "The fourth ground of demurrer is: 'That the claim of the said plaintiff to a strip of ground 5,000 feet in length by 500 feet in width as a tunnel site is unwarranted and unprecedented and was not at the date of said pretended location nor at any time subsequent thereto authorized by any local, state, or congressional law.' Under § 2323 Rev. Stats. the right is given to locate a tunnel 3,000 feet from the face of said tunnel, and the right is also given to the lodes discovered in said tunnel 'to the same extent as if discovered from the surface,' which is 300 feet on each side of the tunnel. Under the local laws of Colorado the right is given to '250 feet each way from said tunnel on each lode so discovered.' 1801, § 5, Gen. Laws of Colo.

¹ Except in Montana by Comp. Stats. 1887, 5th div., sec. 1490. *nel*, see act of Congress of July 25, 1866; Rev. Stats. 2344; Copp, 98; *Sutro Tunnel*

² See Colorado, M. A. S., sec. 3140. *v. Occidental*, Copp, 225 (1878); *Sutro Tunnel Co.*, Copp, 302 (1881). For special legislation on the Sutro Tun-

627. The objection presented by the demurrer is, that the tunnel is 5,000 feet in length, whereas the statute only recognizes a right of 3,000 feet from the mouth thereof, and that this renders the whole claim void. We do not assent to this proposition. The location would be good to the extent of 3,000 feet at least. *Richmond M. Co. v. Rose*, 114 U. S. 576, 580. This would be true had the location been made under the mining laws now in force. It will be observed, however, that this location was made prior to the passage of any general mining law. (1865.) . . .

"It is alleged by the plaintiff in error that this location was made in accordance with the local rules and customs of miners in force at the time of the location, and that, therefore, such location was recognized and protected by the general mineral laws of July 26, 1866, and that of May 10, 1872. This allegation, however, is denied by the defendants; but as these local rules and customs differ in the several districts as to the extent and character of the mine, the question cannot properly be determined on demurrer."

Enterprise M. Co. v. Rico-Aspen Con. M. Co., 66 Fed. 200 (1895), C. C. Ap., 8th Circ., reversing 53 Fed. 321. The plaintiff, having located a tunnel, discovered therein an unknown blind lode, upon which he located a claim. This claim conflicted with, and the lode at a distance of three hundred feet from the point of discovery passed through, the patented lode claim of the defendant, which had been located subsequently to the commencement of the tunnel. The plaintiff was held to be entitled to maintain a bill to enjoin the defendant from taking ore from the lode discovered in the tunnel. The words "not previously known to exist" in the statute refer to the time of the location and commencement of tunnel, and not to the respective times of the discoveries of the various veins in the tunnel. It is the right to the possession of veins not known to exist before the owners of the tunnel located and commenced to excavate it, that is secured to them by this statute, if they subsequently find them in their tunnel, and not the right to those only that were not known to exist when they reached them in the tunnel.

"The argument in which counsel for appellees seem to have the most confidence, however, is that a general view of the acts of Congress relative to mining shows that the policy of the United States is to restrict the amount of the public lands that may be reserved or acquired for mining purposes to small tracts, often not exceeding 1,500 feet in length and 600 feet or less in width, as in lode claims located from the surface (Act May 10, 1872, § 2; Rev. Stats., § 2320); that, if the claim of the appellant that it is entitled to 1,500 feet in length of every vein or lode it discovers in its tunnel is sustained, a tunnel owner may, by locating and lazily prosecuting a tunnel, practically reserve from development and monopolize a tract of land 3,000 feet long and 3,000 feet wide; and that such a reservation would be against public policy, and cannot have been the intention of Congress in the enactment of this section. It must be borne in mind, however, that it is only the right to veins that strike the line of the tunnel, and only such of those veins as are discovered in the tunnel, that the owner gains any inchoate right to the possession of, if this claim of the appellant is

sustained. Others may discover and hold all veins within 1,500 feet of the line of the tunnel that do not strike or cross its line, and all that do strike it that are not discovered in it. Nor can the owner of such a tunnel preserve his rights to undiscovered veins by lazy and perfunctory work. It is true that this section 4 provides that he shall be deemed to have abandoned his rights to undiscovered veins if he fails to prosecute the work on his tunnel for six months; but it also provides that he cannot preserve these rights against subsequent prospectors and locators unless he prosecutes the work upon his tunnel with reasonable diligence. There is a wide margin between the line of abandonment and that of reasonable diligence, and we have no doubt that the courts will so apply the rule of diligence, under this section, that the prompt and energetic prosecutor of a tunnel will receive the just rewards the act of Congress guarantees to his diligence, while the slothful and negligent will not be permitted to deprive other prosecutors of the rights or privileges the act secures to them.

“There is no tenable middle ground under this section between a holding that a diligent owner of a tunnel is entitled to the possession of all the blind veins he discovers in his tunnel to the same extent along the veins as if he had discovered them at the surface, and a holding that by the discoveries and locations of others subsequent to the commencement of his tunnel, and before it reaches the veins at all, he may be deprived of every portion of them, except possibly the small segments within the bore of the tunnel. The latter view seems to have been adopted in *Tunnel, etc. Co. v. Pell*, 4 Colo. 507, and perhaps in *Mining Co. v. Brown*, 19 Pac. 218, 7 Mont. 550; but if we were to consider here the public policy of the nation, and to attempt to derive from that a proper construction of this section of the act, we should be forced to a different conclusion. We should be constrained to hold that such a construction of this section would not only be contrary to public policy, but would defeat the evident purpose of Congress in the enactment of this law. It has been the settled policy of the United States, from the passage of the first act of Congress opening the mineral lands of the nation to exploration and occupation on July 26, 1866, to the present time, to encourage the discovery and development of the mineral resources of the country: The government has practically offered the mineral deposits in the public lands as a reward for their discovery and appropriation to private use. By the act of May 10, 1872, the prospector who discovers a mineral lode or vein on the surface or from the surface is given the right to 1,500 feet of the vein or lode for a mere nominal consideration. Such veins frequently appear on the surface of the earth. They are often known to exist before any labor is performed on them. The labor, expense, and risk of loss in the discovery and development of such veins from the surface are light, indeed, in comparison to those required upon a tunnel that is run to discover unknown veins. The work of driving such a tunnel thousands of feet into the side of a mountain, for the purpose of discovering a vein or lode that is not known to exist at all, is an extremely hazardous and expensive undertaking. This is common knowledge, and Congress must be taken to have had this knowledge when they enacted this law. They must have known that such a hazardous enterprise

was not likely to be undertaken unless rewards commensurate with the risk and expense were offered. In view of these facts, can it be successfully maintained that, while they secured to the discoverer at or from the surface 1,500 feet of this vein, they guarantied to those who drove a tunnel thousands of feet into the rocks of a mountain nothing but the segments of the veins they found within its bore? We think not. We are of the opinion that by section 4 of this act they intended to and did guaranty to the owners of such a tunnel the possession of all the veins they discovered therein to the same extent along the veins as if they had discovered them from the surface, and that this guaranty was in full accord with the settled policy of the government to suitably reward those who discover and develop the mineral resources of the nation.

“Moreover, it is not necessary to resort to public policy to find a proper construction for this section. It construes itself. A careful study of it compels the conclusion that inchoate rights to undiscovered veins were thereby guarantied to the diligent owners of tunnels contingent only upon their discovery therein. The last clause provides that failure to prosecute work upon the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of the tunnel. How could such a right be abandoned if it did not exist? The second clause provides that locations by others on the line of the tunnel after the commencement thereof shall be invalid. Why should they be declared invalid unless to secure to the owners of the tunnel their rights to the veins thus discovered and located by others, until these owners of the tunnel could reach and discover them therein? And the first clause of the section declares that:—

“‘The owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.’

“The guaranty of that clause is plain and certain, and our conclusion is that from the time of the location of a tunnel under section 4 of the act of May 10, 1872, its owner has the inchoate right to the possession of every vein or lode within three thousand feet from the face of such tunnel on the line thereof that was not known to exist when the tunnel was located and its excavation was commenced, contingent only upon the diligent prosecution of the work on the tunnel and the subsequent discovery of the vein or lode therein. Upon the discovery of such a vein in the tunnel while the work is being prosecuted with reasonable diligence, such owner is entitled to the possession of such lode or vein to the same extent along the lode or vein as if discovered from the surface. No discovery or location of such veins or lodes subsequent to the location and commencement of the tunnel can deprive the owner of the tunnel, who diligently prosecutes his work therein, of these rights. *Back v. Mining Co.* (Idaho), 17 Pac. 83, 85; *Mining Co. v. Brown* (Mont.), 28 Pac. 732, 734.”

When a tunnel claimant has discovered a blind lode in his tunnel, he may locate it fifteen hundred feet in either direction, or partly in one direction and partly in the other.

The provisions of the law of 1861, M. A. S., sec. 3141, limiting the

rights of the person engaged in working the tunnel to two hundred and fifty feet each way from said tunnel, has been repealed by the act of 1874.

The right of the locator of tunnel claim to a lode discovered therein is not defeated by the location of a lode claim subsequent to the commencement of the tunnel and including the point of discovery.

Where a lode is discovered in the tunnel subsequent to the application for patent for a lode claim which was located after the commencement of the tunnel, the tunnel claimant's rights are not affected by his failure to file an adverse claim.

California. *Gregory v. Pershbaker*, 73, 109 (1887). An occupancy by tunnel, if it could be considered at all in this case, under the statutes would extend only to the space within the walls of the tunnel, and could not be extended beyond them by any rule of constructive possession.

Colorado. *Corning Tunnel Co. v. Pell*, 4, 507 (1878). The right of possession of veins or lodes granted by Rev. Stats. 2323 to tunnel owners is dependent, among other things, upon discovery of the vein or lode in the tunnel. The effect of this section is to give a party running a tunnel, whether for prospecting or development, the right to pre-empt and locate all lodes not previously known to exist discovered in such tunnel, to the same extent as if discovered on the surface.

"Line of the tunnel" in the act does not mean the entire width and length of the surveyed tunnel site. It designates a width marked by the exterior lines or sides of the tunnel. The act does not provide for or authorize a tunnel site survey and location fifteen hundred feet in width.

Ellet v. Campbell, 18, 510 (1893). Plaintiff's predecessor in title had duly located a tunnel claim, which was marked on the ground by stakes along the line of the tunnel for three thousand feet, and lines run parallel thereto on each side at the distance of seven hundred and fifty feet. A lode was discovered in the tunnel, which did not appear on the surface and was not previously known to exist. A notice of this discovery was posted at the mouth of the tunnel and recorded, by which the lode was claimed for a distance of seven hundred and fifty feet on each side of the point of discovery. No claim was marked on the surface. This was held to be unnecessary; and the plaintiff's title prevailed over that of one who subsequently located the same lode upon the surface.

Elliot, J.: "Every consideration, therefore, requires that the Tunnel Site Act should receive the most liberal construction consistent with reason and the language employed.

"Section 2323 was obviously designed to encourage the running of tunnels for the discovery and development of veins or lodes of the precious metals not appearing on the surface and not previously known to exist. Little encouragement would the act give, if the discoverer of a lode in a tunnel were bound also to find the apex and course of such vein, uncover the same from the surface, sink his location shaft thereon, mark the boundaries thereof, and record his certificate of such surface location the same as if he had made the original discovery from the surface."

"When a tunnel owner has duly located his tunnel claim and thereafter discovers a mineral lode therein, according to all the conditions specified in section 2323, he is not bound to make another discovery and location of the lode from the surface in order to be protected against a subsequent surface locator of the same lode."

"Counsel for appellee contends that the case of *The Corning Tunnel Co. v. Pell*, 4 Colo. 507, . . . is opposed to the view expressed in this opinion. The Pell case was an action of ejectment brought by the Tunnel Company in support of an adverse claim; no equitable relief was invoked; nor could any be had according to the practice under which that suit was instituted. At the trial of that case in the lower court there was no evidence and no attempt to prove that the lode in controversy had been discovered in the tunnel. Upon that ground it was held that the Tunnel Company had not acquired such right of possession as would enable it to maintain ejectment; and so the judgment of nonsuit was granted. Upon appeal, the judgment of nonsuit was affirmed upon the same ground; but the court in its opinion discussed and passed upon several questions concerning the rights of tunnel site claimants, which, though perhaps fairly presented by the record, were not really necessary to the determination of that appeal. What the decision would have been if the lode had been actually discovered by the Tunnel Company in the tunnel and on the line thereof, before suit brought and before Pell discovered and located the lode, cannot be certainly known. Pell's location was within the limits of the tunnel location, but not on the line of the tunnel. The court expressed the opinion that the Tunnel Company did not have the exclusive right of possession to the whole tunnel location, 1,500 × 3,000 feet, and that the location of Pell was not upon the line of the tunnel, that is, the line of the actual bore or excavation, and as the Tunnel Company had not discovered the lode in the tunnel, it could not maintain ejectment to recover the lode.

"If the Tunnel Company had discovered the lode in the tunnel and on the line thereof prior to its discovery by Pell, and other conditions had been the same in this case, the Tunnel Company's right of possession to the lode might have been maintained to the same extent as if discovered from the surface, without a surface location in addition to the tunnel location. If the views expressed in the Pell case will not bear such a construction, we must decline to be governed by them under the facts admitted in this case."

"In our opinion the words 'same extent' mean the same extent 'along the vein or lode.' While the acts of Congress leave the width of mining claims upon the surface subject to local regulations within certain limits, the length and depth may not be thus regulated." The tunnel claimant is consequently entitled to fifteen hundred feet.

Back v. Sierra Nevada Con. M. Co., 2, 386 (1888). When **Idaho.** a tunnel is located under the provisions of Rev. Stats. 2323, so much of the public domain as lies on the line of the tunnel is withdrawn from exploration for lodes not appearing on the surface. These are reserved for the benefit of the proprietor of the tunnel so long as he prosecutes his work with diligence, and he has the right of possession for this purpose. Where, therefore, subsequent to the

location of a tunnel, another person enters upon the line of the location at a point where that line is marked by a post, with knowledge of the existence of the post, and sinking a shaft discovers at a depth of twelve feet a ledge which does not outcrop, which is on the line of this tunnel and will on its dip intersect the tunnel when extended, the tunnel owner has a superior right which he may protect by adverse claim when the subsequent locator seeks a lode patent. A tunnel location is a mining claim within the meaning of Rev. Stats. 2326, and the tunnel locator may protect his rights by means of an adverse claim.

Montana. *Hope M. Co. v. Brown*, 7, 550 (1888). Plaintiff duly located a tunnel claim and began work on the tunnel. Defendant located a quartz claim on the surface within three hundred feet of the line of the tunnel, and was working a vein which appeared to trend across plaintiff's tunnel. Plaintiff sought damages and an injunction, which were denied.

A tunnel claimant has no right to any claim except for such veins or lodes as may be discovered within three thousand feet from the face of the tunnel and in the tunnel itself. When a vein or lode is discovered in the tunnel, then the claimant is entitled to it for fifteen hundred feet along its length, and to the extent of three hundred feet on each side thereof from the middle of the vein. His rights are exactly what they would have been if he had made the discovery from the surface. He has the additional right that, if after the commencement of a tunnel, and pending its progress, a third person should locate a vein or lode on the line of the tunnel, which was not discovered from the surface, the location would not be valid. The term "line of the tunnel" designates a width marked by the exterior lines or sides of the tunnel.

Third persons have the right to locate lodes within three hundred feet¹ on either side of, but not on, the line of the tunnel. Such locations, however, are made at the risk of the locator, for upon discovery of the vein or lode in the tunnel all locations made subsequent to the commencement of the tunnel become invalid if they are within three hundred feet on either side of the vein, and within fifteen hundred feet as located along the discovered vein or lode.

Veins or lodes discovered on the surface or previously known to exist, are not affected by the rights of the tunnel claimants.

The complaint in this case was insufficient in that it did not allege that the vein in question would cross the tunnel. The court will not infer in what direction a vein will continue its course.

Hope M. Co. v. Brown, 11, 370 (1891). Plaintiff located a tunnel claim, marking out the boundaries three hundred feet either side of the tunnel. After plaintiff began work respondent made discovery within these boundaries of a vein, not appearing on the surface and not previously known to exist, and the direction of the strike of which crossed the proposed tunnel.

Held, respondent will be enjoined from prosecuting proceedings for patent while the tunnel is duly worked and until it is demonstrated that the lode will be discovered in the tunnel. In the mean time, in an action on an adverse claim, it is error to find judgment for the

¹ This is the width of a tunnel claim prescribed by the Montana statute. Comp. Stats., 1887, 5th div., sec. 1488.

lode claimant. Definition of "line of tunnel" in *Corning Co. v. Pell* disapproved.

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The line of the tunnel is the width thereof and no more, and upon this line only is prospecting for blind lodes prohibited while the tunnel is in progress. Outside of this other parties may run tunnels and prospect for such lodes. When a lode is discovered by running a tunnel, the tunnel owners have the option of recording their claim of fifteen hundred feet all on one side, or partly on one and partly on the other side of the point of intersection; but it must not absorb the actual or constructive possession of other parties on a lode previously discovered and claimed outside the line of the tunnel. Copp, 90 (1872).

There is no specific amount to be expended to retain ownership of a tunnel location. Work thereon must proceed with reasonable diligence; otherwise it will be treated as abandoned. Copp, 121 (1873).

No patent can issue for a vein or lode without surface ground; and as the surface which overlies the apex of a vein or lode discovered in a tunnel can only be ascertained by sinking a shaft or by following a lode upon its dip from the point of discovery, a survey of a lode of this kind cannot be properly made until it has been definitely determined what portion of the public domain overlies the apex of such lode. Copp, 220 (1877).

The co-owners of a tunnel who have made the required expenditure may proceed against delinquent co-owners in the manner provided by Rev. Stats. 2324. A tunnel owner has a right to timber growing on a tunnel site, so long as he complies with the law in running such tunnel. A tunnel site cannot exceed in length three thousand feet, and its width is the actual width of the tunnel. Copp, 222 (1878).

When a lode is discovered in a tunnel, the surface ground which overlies its apex must be ascertained, and the claim then duly located as if discovered from the surface. Copp, 231 (1878).

The requirements of location and notice of a proposed tunnel apply only where blind lodes are sought to be discovered. Where a party runs a tunnel to develop a known lode already discovered and located, notice of such intention is not required, and a tunnel location need not be made. Copp, 301 (1881).

If application is made for a patent for lode claims lying across the line of a tunnel, the locator of the latter must file an adverse claim and begin suit as provided by the statute. Otherwise he will be held to have waived his claim. The only place in which controversies between conflicting mining claimants or adverse claimants can be heard is a court of competent jurisdiction. *Bodie T. & M. Co. v. Bechtel C. M. Co.*, 1 L. D. 584 (1881).

V. MILL SITES.

Mill sites of two kinds or classes may be located and patented in connection with mining operations. Provision is made therefor by Rev. Stats. 2327.

(a) The first class provided for is of mill sites appurtenant to lode claims. Each lode claimant is entitled to take up five acres of non-mineral land not contiguous to his lode, as such a site; but he must use this for mining and milling purposes in connection with the lode to which he has tied it. If he has used or occupied this land either for mining or milling purposes, he may embrace it in his application for a patent, and it may be included in his patent for his lode claim, subject to the same preliminary requirements as to survey and notice as are applicable to veins and lodes, and to payment therefor at the same rate as for the superficies of the lode claim, viz., five dollars per acre.

Such a site consequently must possess three requisites: 1. It must be non-mineral, which term is defined, as in other connections, as land which cannot be profitably mined. 2. It must be non-contiguous to the lode. 3. It must be used or occupied either for milling or mining purposes.

Before a patent will issue, its non-mineral character must be affirmatively established. To do this, it is not sufficient to show that it contains no lode or vein: it must contain no valuable mineral deposit of any kind. If the site abuts on the end of a lode claim, there is a presumption that it is mineral; but this may be rebutted. Its use in connection with the work done upon the lode itself, provided that is sufficient to meet the obligation of the statute in relation to annual work, is a sufficient compliance with the requirement as to use for mining purposes. But the use must be an actual use of the land itself. Use of the timber is not sufficient. Nor is the mere use of the water, unless there is some use of the land connected therewith. Thus the appropriation of the water thereon, and the use thereof beyond the boundaries of the mill site, does not satisfy the statute. But the use, occupancy, and improvement of the land for the maintenance of a water supply, or of pumping works necessary for the operation of a lode mine, is within the act. It is sufficient merely to build a cabin thereon and store tools therein, or to erect dwelling houses for the workmen engaged in the mine, but not to use the land for dumping ore or to build a tramway.

The use should be an actual use at the time of the application, but such an occupation by improvements or otherwise as evidences an intended use will be accepted by the Land Department.

If the above requirements are complied with, the site is pro-

tected as a mining claim from other subsequent grants, and the \$500 improvements on the lode are sufficient to enter both lode and mill site. Notice and plat must be posted on the mill site as well as on the lode; but it is not necessary that the survey of the mill site be connected with a corner of the public survey or a mineral monument, if it is properly connected with the survey of the lode claimed in connection therewith.

A mill site may be composed of several separate tracts, provided they do not exceed five acres in the aggregate. But land may not be entered as such where it is intended to be used in common with other mill sites, taken in connection with a like number of lodes. Its use must be independent, and connected with a single lode claim.

The location of a mill site operates as a grant of the exclusive possession of all the surface ground within its limits. It is a mining possession. If application is made for a patent for a mining claim conflicting therewith, it can only be protected by adverse claim.

The mill-site claimant may cut timber on the site for improvements thereon connected with his works.

(b) The second class of mill sites are thus provided for by the statute: "The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section."

This class is entirely independent of any mine. The sole requirement is that the applicant for the patent should own a quartz mill or reduction works existing upon the land. But it must be entirely upon the mill site claimed, and independent of any other site. If the mill is on the line between two mill sites, so that there is a quartz mill or reduction works on neither independently of the other, a patent will not be allowed.

The reader should also consult the Land Office Regulations, pars. 64-68.

Hartman v. Smith, 7, 19 (1887). A mill site having been properly located in 1882 as appurtenant to a lode mining claim, to which it was contiguous, in that and the following year a log cabin was built thereon, and shovels, picks, drills, powder, tools, and small quantities of ore were stored therein. Upon an application for a patent for the mining claim and the mill site, an adverse claim was filed by the patentee of a town site covering the ground under a

patent applied for in 1884. The use of the mill site was *held* to be within the statute, and the claimant entitled to patent.

"In the case of the owner of a quartz lode mining claim the purpose mentioned in the statute is in the alternative, viz., 'mining or milling purposes.' It may be appropriated by such owner for either purpose, and, if for either, such use will be sufficient. The statute does not mention any particular kind of mining purpose for which it shall be used; and therefore, if used in good faith for any mining purpose at all in connection with the quartz lode mining claim, such use would be within the statute. It is certainly not intended that it shall be used for such work as is done upon the mine itself, for the land must be non-mineral, and not adjacent to the mining claim." Nor is the extent or character of the use prescribed. If the owner of the claim only does the required one hundred dollars' worth of work each year, and uses the mill site in connection therewith, this is the use of the mill site for mining purposes.

"The location of a mill site perfected according to law, like that of a quartz lode mining claim, operates as a grant by the United States of the present and exclusive possession of all the surface ground included within its limits." Used for mining purposes in connection with the mine, it is not forfeited nor abandoned.

It is a mining "possession," and as such reserved from sale as a town site under Rev. Stats. 2392.

Hamburg M. Co. v. Stephenson, 17, 449 (1883). In an action to determine conflicting claims to real property, defendant's only claim of right or title was such as results from an application for a patent for a mill site. There was no evidence that he ever made an application for a patent to a mine, or that his application for a patent to the mill site was included in any application for a patent to any non-contiguous vein or lode; nor did he claim to be the owner of a quartz mill or reduction works, not owning a mine in connection therewith. His claim was held to be without merit.

LAND OFFICE DECISIONS.

Patent for a mill site will not issue upon affidavits that the land "does not to his knowledge contain any vein or lode of quartz, etc., bearing gold," etc. The proofs should show that it contained no valuable deposits of any kind, — placer or gulch, as well as lode. *Copp*, 88 (1872).

The location of a mill site upon land granted to the Central Pacific Railroad Company after their rights took effect could create no adverse right thereto as against the company, the land being non-mineral. *Copp*, 90 (1872).

Where a patent for a mill site is applied for in connection with a lode claim, there need be no expenditure on the mill site. It is only necessary for the applicant to show that \$500 has been expended upon the lode claim. *Copp*, 132 (1874).

The fact that a mill site abuts on the end of a lode claim raises a presumption that it is upon mineral land; but this is not conclusive, and proof of its non-mineral character will be received. *National M. & E. Co.*, *Copp*, 298 (1880).

A mill-site claim conflicting with a mining claim for which application for patent has been made, can be protected only by adverse claim filed within the prescribed time. *Warren Mill Site v. Copper Prince*, 1 L. D. 555 (1882).

If a mill site is timbered, the lawful claimant may cut and remove the timber thereon for the purpose of constructing a mill, reduction works, tramways, or other accessories required in the development of his mining interests. *A. B. Page*, 1 L. D. 614 (1883).

Under Rev. Stats. 2337 a mill site embraced in an application and entry for a lode claim may include such number of pieces or tracts within the restriction of five acres as may appear to be necessary to the proprietor of the lode claim for mining and milling purposes. *J. B. Hoggin*, 2 L. D. 755 (1884).

The law requires the posting of notice and plat on the mill site, as well as upon the lode portion of a mining claim. In this case, inasmuch as the failure to post was an oversight, and no adverse right had intervened, and extensive improvements had been made, the requirement was waived. *Bailey & Grand View M. & S. Co.*, 3 L. D. 386 (1885).

Town sites may be located on mineral land, and the town-site claimants will hold subject to the right of mineral claimants, including owners of mill sites on land non-mineral, and not contiguous to their lodes. *Esler v. Townsite of Cooke*, 4 L. D. 212 (1885).

It is not a valid objection to an application for patent for a mill site that the land contains water, in which a water right may be acquired. It is entirely consistent with the laws of the United States that a tract of land may be covered by the water right of one person and by the settlement, mining, or mill-site claim of another person.

Land not contiguous to the vein applied for as a mill site must be actually used or occupied for mining or milling purposes. If not actually used, the applicant must show such an occupation, by improvements or otherwise, as evidences an intended use. The use of the water from the land in running a smelter on other land is not the use of the land. *Charles Lennig*, 5 L. D. 190 (1886); *Cyprus Mill Site*, 6 L. D. 706 (1888).

An entry made on an application covering a lode claim and contiguous mill site, where the proof shows full compliance with the law, except in posting on the mill-site portion of the claim, may be confirmed by the Board of Equitable Adjudication in the absence of an adverse claim, and where the informality was the result of an honest mistake. *N. Y. L. & M. Claim*, 5 L. D. 513 (1887).

The occupation of land for the purpose of securing the timber therefrom for use in working his lode is not the use or occupation thereof for mining or milling purposes contemplated by Rev. Stats. 2337. "The use of the timber thereon is not the use of the land; neither is the mere naked possession of the tract for the purpose of taking the timber therefrom such an occupancy of the land as is contemplated by the act." *Two Sisters Lode and Mill Site*, 7 L. D. 557 (1888).

The expenditure of \$500 upon the mill site is not a condition precedent to obtaining a patent therefor when the applicant is also the proprietor of a lode, and the mill site is located in connection

therewith. In such case it is only required that the mill site shall be used or occupied for mining or milling purposes.

It is not necessary that the survey of the mill site should be connected with a corner of the public surveys or a mineral monument, if such survey is properly connected with the survey of the lode claimed in connection therewith.

The non-mineral character of the land claimed as a mill site must be established. *Alta Mill Site*, 8 L. D. 195 (1889).

Land will not be patented as a mill site unless used or occupied for mining or milling purposes. The appropriation of water upon the land claimed as a mill site, and the use of the same beyond the boundaries thereof, is not the use and occupation contemplated by the statute. *Iron King M. & M. Site*, 9 L. D. 201 (1889).

A quartz mill or reduction works are the only improvements on which an application for a mill site may be based under the last clause of Rev. Stats. 2337. A dam, pen stock, and pipe which are used for driving a water wheel to compress air for the engine and drills used in mining on adjacent lodes are insufficient. *Le Neve Mill Site*, 9 L. D. 460 (1889).

A duly qualified corporation may obtain title to a mill site under Rev. Stats. 2337. *Bay St. G. M. Co. v. Trevillion*, 10 L. D. 194 (1890).

A mill-site application for non-contiguous ground is not within the statute unless it is used or occupied for mining or milling purposes in connection with the lode in whose application it is included. The construction of a dam, the use of the ground for the purpose of dumping ore, and the intention to build a mill are insufficient. *Peru L. & M. Site*, 10 L. D. 196 (1890).

The use and occupancy of land for the maintenance of pumping works necessary to the operation of a lode mine is such a use as will authorize entry of the land as a mill site.

"Here we find actual occupation of the land, with lasting and valuable improvements. It is true the company consumes only the water; but it occupies and uses the land in connection with its lode mine, and such use is necessary to the operation of the mine." *Sierra Grande M. Co. v. Crawford*, 11 L. D. 338 (1890).

A patent will not be issued for a mill site where it appears that it has not been used in connection with the lode in whose application it is included, but has been occupied by another, to whom the applicant had agreed to convey it upon obtaining title. *Syndicate Lode Mill Site*, 11 L. D. 561 (1890).

The right to a mill site under the second clause of Rev. Stats. 2337 depends upon the existence upon the land of a quartz mill or reduction works.

There is no provision of law by which a mill site can be acquired as additional to or in connection with an existing mill site. *Hecla Con. M. Co.*, 12 L. D. 75 (1891).

That a dam has been built thereon and ditching for a flume for the purpose of — in common with improvements on other land — furnishing water power for mining and milling purposes, is not the use of the land for mining and milling purposes, and land so improved may not be claimed as a mill site.

Rev. Stats. 2337 does not authorize the entry of a mill site, where the land included therein is intended to be used in common with other mill sites, taken in connection with a like number of lode claims. *Mint L. & M. Site*, 12 L. D. 624 (1891).

While mill sites are sold under the mining laws (Rev. Stats. 2337), yet they are disposed of as "non-mineral land," and the provision of Rev. Stats. 2336 relative to the priority of title upon the intersection of two or more veins, has no application to mill sites which have been patented and lie across lode claims, separating them into two parts.

A lode claim that is divided into two parts by an intersecting patented mill site must be confined to that part which contains the discovery shaft and improvements. *Andromeda Lode*, 13 L. D. 146 (1891).

The requirements of the statute, where a mill site is claimed in connection with a lode, are: (1) The land must be non-mineral, (2) non-contiguous to the lode, and (3) used or occupied by the proprietor of the lode for mining and milling purposes. The use and improvement of land for the maintenance of a water supply, necessary to the operation of a mine, is such a use and occupancy as will authorize a mill-site entry.

"A tank, a spring house, and a stone cabin have been erected on the mill site. The tank was built 'for the storage of water sufficient for operating the mine,' the water was used to develop the mine and for no other purpose."

"In the case at bar, lasting improvements have been made on the land embraced in the mill site, indicating good faith. There is more than the mere use of water; the mill site itself is improved and used, as above seen in connection with the mine.

"Moreover, it is shown that claimant requires the mill site upon which to erect his mill to reduce the ores from the mine.

"Claimant's good faith is manifest, and I think the evidence shows a sufficient compliance with the law, as to the use and occupation of the land, to justify the issuance of patent, which is hereby directed." *Gold Springs & Denver City M. S.*, 13 L. D. 175 (1891).

The building of a tramroad, or the grading of the roadbed therefor, is not such a use or improvement of the land as warrants the allowance of a mill site.¹ An application for a mill site cannot be allowed where it appears that the improvements are located on the line between two mill sites, without either location possessing a quartz mill or reduction works independently of the other. *Hecla Con. M. Co.*, 14 L. D. 11 (1892).

The erection and maintenance in good faith of dwelling houses for occupancy by workmen employed for purposes in connection with a mill not on the site is such a use and occupancy of the land as will justify the allowance of a mill-site entry thereof. *Satisfaction Extension M. Site*, 14 L. D. 173 (1892).

The first clause of Rev. Stats. 2337 contemplates the allowance of a mill-site entry only where the land is used or occupied for mining or milling purposes at the time the application for patent is made. *Hudson M. Co.*, 14 L. D. 544 (1892).

¹ It is doubtful whether this extreme ing of a permanent tramway is certainly position will be maintained, for the build- a use of the land for mining purposes.

Rev. Stats. 2337 authorizes the location of mill sites prior to application for patent. It provides that they may be patented "subject to the same preliminary requirements as to survey and notice as are applicable to veins and lodes." "It will not be denied that the basis of a mineral claim is the due location thereof, and the practice of the Land Department has uniformly been, as I am informed, to require evidence of the due location of the mill site prior to the publication of notice of application for patent therefor." *Hargrove v. Robertson*, 15 L. D. 499 (1892).

Only non-mineral land can be appropriated as a mill site; and an application therefor must be rejected where the land is embraced in a prior railroad grant, which passes non-mineral land. *Mongrain v. Northern Pac. R. Co.*, 18 L. D. 105 (1894).

Non-contiguous land may be patented as a mill site in connection with a lode claim previously patented. Though the statute says the mill site may be included in the application for the lode patent, such a course is not obligatory.

An office and residence for the superintendent, a stable, railroad switch, and storehouse are sufficient improvements, if made in good faith. *Eclipse Mill Site*, 22 L. D. 496 (1896).

VI. WATER RIGHT CLAIMS.

This subject is treated in Chapter XX., Div. I., under the title "Water Rights on the Public Lands."

CHAPTER XVI.

CONFLICTING GOVERNMENT GRANTS.

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| I. Town Site Grants. | IV. Homestead and Pre-emption Grants. |
| II. School Land Grants. | V. Indian Reservations. |
| III. Land Grants to Railroads. | |

WHEN the government has granted the legal title to any of its lands to an individual or corporation, they then become private property, and cannot be the subject of a second grant. The only question that can arise, except that of fraud or mistake, is whether the grant has been made, and of this question the government's conveyance, its patent, is conclusive. If, therefore, mineral land should be claimed under two mineral patents, the question of ownership would be determined by the dates of entry or location. This question has been discussed already in Chap. XIV., Div. III., "Effect of the Patent." But a different question arises where there is a conflict between different kinds of grants, that is, where land is claimed under a title acquired under the mineral laws, and likewise by a grant as a town site, as school land, railroad land, agricultural land, or Indian reservation. To the solution of the difficulty here presented, two complementary principles are applicable and sufficient. A patent for a portion of the public lands issued by the Land Department, in a case where it has jurisdiction, is conclusive of title, and in the absence of fraud indefeasible. But the Land Department has not jurisdiction under a congressional grant to issue a patent for lands reserved out of that grant, and such a patent is void. The application of these principles will be best illustrated by a detailed discussion of the different kinds of grants.

I. TOWN SITE GRANTS.

There cannot be a real conflict between a town site and a mining patent. The statutes governing the former were, until March 3, 1891, the following:—

Rev. Stats., sec. 2386. "Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States."

Sec. 2392. "No title shall be acquired under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining claim or possession held under existing laws."¹

Mineral deposits within town sites are therefore open to exploration and purchase in the same manner as elsewhere. In other words, mineral lands *are reserved out of* the grant of a town site. By patents of town sites they do not pass. And it only remains to determine what are mineral lands within the meaning of this reservation. These are valid mining claims or possessions under existing laws, and also "any mine" of the enumerated metals. This includes all land known at the time of the grant to be mineral land, *i. e.*, available and valuable for its mines of gold, silver, cinnabar, copper, or lead. If mineral is not found in the land in sufficient quantities to justify the effort, or to make it profitable, to extract it, the land is not mineral. The land must also be known to be thus valuable *at the time of the grant*. A subsequent discovery of rich deposits will not bring it within the reservation; nor will its previous mineral character, if it has been worked out and abandoned.

It follows, therefore, that a town-site patent cannot divest the title of any locator of an existing mining claim within its boundaries, the location of which was made prior to the date of the patent;² nor can a previous appropriation and use of land as a town site defeat a patent issued to a subsequent locator of the ground as a mining claim; nor can a town-site patent pass title to land which is claimed under a subsequent patent as mining ground, where any step toward acquiring title as mining ground was taken before the patent for a town site issued, unless it can be shown that *at that time the land was not known to be mineral*. But a

¹ While the act of March 3, 1891, repeals these sections, it re-enacts them in substance.

² See Montana Pol. Code 1895, sec. 5112.

patent for mineral land, the title to which was initiated after the date of the town-site patent, will not prevail over the latter unless the land was known to be mineral at the date of the town-site entry. The practice of the Land Office has been to allow town-site entries on land returned as mineral, and to refuse to decide conflicting claims of mineral claimants, on the ground that the question of rights was one of priority of occupation which should be decided by the courts. Neither the town-site patent, therefore, nor a subsequent mineral one, was conclusive of the character of the land, and did not preclude evidence of its character at the date of the town-site entry.

By the decisions of the Land Department a town-site patent is inoperative as to all land known to be valuable for its minerals at the time of entry, or discovered to be such prior to occupation or improvement under the town-site laws. The Department hitherto has refused to issue a mineral patent for land within the limits of a previous town-site patent, but first requires proceedings for the vacation of the latter patent to the extent of the known mineral deposits. This practice, however, it would seem, has now been altered by the act of March 3, 1891, sec. 16, 1 Supp. Rev. Stats. 945, the terms of which are as follows:—

“Town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law.

“When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, that no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.”

This statute has not yet been the subject of judicial construction. It repeals Rev. Stats. 2386, 2392, re-enacting those sections

in substance, and making definite provision for the patenting of mineral lands within the lines of a town-site patent.

An exception in the mining patent of town property rights upon the surface and improvements thereon cannot avail the town lot owner. The exception is a nullity, as its insertion is unauthorized. It was the former practice of the Land Office to insert such a reservation in patents, but this has been discontinued, on the authority of *Deffebach v. Hawke*.

In California it has been held that in a town-site patent issued prior to 1872 only the ledge and not the surface was excepted from the grant.

In determining the question of the mineral character of the land, the burden of proof is on the party asserting it. This is subject to an exception in the case of a mining patent, which *prima facie* establishes the fact that the land was known at the inception of the title to contain minerals. The existence of an invalid location will not, however, establish this fact. And a valid location, if subsequently abandoned, will be insufficient to do so though the locator maintained an actual possession of the machinery of mining until the date of the town-site patent. His claim is not a valid claim or possession under existing laws.

The right of way in the streets of a city, which existed at the time of a location of a mining claim covering the same ground, is protected by Rev. Stats. 2477, which is a grant that cannot be divested by the subsequent patent of the mining claim.

United States. *Steel v. Smelting Co.*, 106, 447 (1882). Field, J.: "Land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown on what was, on its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established."

"The acts of Congress relating to town sites recognize the possession of mining claims within their limits, and forbid the acquisition of any mine of gold, silver, cinnabar, or copper within them under proceedings by which title to other lands there situated is secured, thus leaving the mineral deposits within town sites open to exploration, and the land in which they are found, to occupation and purchase in the same manner as such deposits are elsewhere explored and possessed and the lands containing them are acquired. Rev. Stats., secs. 2386, 2392. Whenever, therefore, mines are found in lands belong-

ing to the United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with. Whether there are rights thus interfered with which should preclude the location of the miner and the issue of a patent to him or his successor in interest is, when not subjected under the law of Congress to the local tribunals, a matter properly cognizable by the Land Department, when application is made to it for a patent." And a patent having issued to the mine, it cannot be collaterally attacked by one claiming title under the town-site grant.

Deffeback v. Hawke, 115, 392 (1885). Field, J.: "The principal question presented by the pleadings for our consideration, is whether, upon the public domain, title to mineral land can be acquired under the laws of Congress relating to town sites. The plaintiff asserts title to mineral land under a patent of the United States founded upon an entry by him under the laws of Congress for the sale of mineral lands. The defendant, not having the legal title, claims a better right to the premises by virtue of a previous occupation of them by his grantor as a lot on a portion of the public lands appropriated and used as a town site, that is, settled upon for purposes of trade and business, and not for agriculture, and laid out into streets, lots, blocks, and alleys for that purpose.

"In several acts of Congress relating to the public lands of the United States passed before July, 1866, lands which contained minerals were reserved from sale or other disposition. Thus the pre-emption act of 1841, 5 Stat. 453, excepts from pre-emption and sale 'lands on which are situated any known salines or mines.' *Ib.* 455, ch. 16, § 10; and the act of 1862, extending to California the privilege of settlement on surveyed lands, previously authorized in certain States and Territories, contains a clause declaring that the provisions of the act 'shall not be held to authorize pre-emption and settlement of mineral lands.' 12 Stat. 409, 410, ch. 86, § 7. Similar exceptions were made in grants to different States and in grants to aid in the construction of railroads. Thus in the grant to California of ten sections of land, for the purpose of erecting the public buildings of that State, there is a proviso 'that none of said selections shall be made of mineral lands.' 10 Stat. 244, 248, ch. 145, § 18. And in the grants to the Union Pacific Railroad, and its associated companies, to aid in the building of the transcontinental railroad and branches, there is a proviso declaring that all mineral lands other than coal or iron shall be excepted from them. 12 Stat. 489, ch. 120, § 3; 13 Stat. 356, 358, ch. 216, § 4. A similar exception is made in grants for universities and schools; and in the law allowing homesteads to be selected, it is enacted that mineral lands shall not be liable to entry and settlement for that purpose.

"By the act of July 26, 1866, the policy of reserving mineral land from sale or grant was changed. That act declared that the mineral lands of the public domain were free and open to *exploration and occupation* by all citizens of the United States, etc. . . . The act of May 10, 1872, to promote the development of the mining resources of the United States, repealed several sections of the act of 1866, and,

among others, the first section, but enacted in place of it a provision declaring that 'all valuable mineral deposits' in lands belonging to the United States, both surveyed and unsurveyed, were 'free and open to exploration and purchase,' and the lands in which they are found to occupation and purchase,' subject to the conditions named in the original act. . . . By the act of February 18, 1873, mineral lands in the States of Michigan, Wisconsin, and Minnesota were excepted from the act of May 10, 1872, and those lands were declared to be free and open to exploration and purchase according to legal subdivisions in like manner as before. 17 Stat. 465, ch. 159. The provisions of the act of 1872, with the exceptions made by the act of 1873, were carried into the Revised Statutes, which declare the statute law of the United States upon the subjects to which they relate, as it existed on the 1st of December, 1873. Rev. Stats. 2345. All other provisions contained in the act of which any portion is embraced in this revision are in express language repealed. . . .

"Turning to that portion of these statutes treating of mineral lands and mining resources which is contained in chapter six of title xxxii., we find that its first section declares that 'in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.' § 2318. Title, therefore, to lands known at the time to be valuable for their minerals, could only have been acquired after December 1, 1873, under provisions specially authorizing their sale as found in these statutes, except in the States of Michigan, Wisconsin, and Minnesota, and after May 5, 1876, in the States of Missouri and Kansas. By the act of Congress of the latter date, 'deposits of coal, iron, lead, or other mineral' in Missouri and Kansas were excluded from the operation of the act of May 10, 1872, that is, from such provisions of that act as were re-enacted in the Revised Statutes. 19 Stat. 52, ch. 91. In those portions of the Revised Statutes which relate to pre-emption and to homestead entries the clauses from the original acts excepting mining lands are retained. §§ 2258, 2302.

"If now we turn to the laws relating to town sites on the public lands, and the provisions authorizing the sale of lands under them, or to the entry of town sites for the benefit of their occupants, as contained in the Revised Statutes, we shall find a similar exception from sale or entry under them of mineral lands. Title xxxii. of the Revised Statutes contains the law as to the public lands. Chapter eight of that title relates to the reservation and sale of town sites on the public lands. . . . In one section it declares that 'where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and the necessary use thereof,' with a reservation also that nothing in the section shall be construed to recognize any color of title in possessors for mining purposes as against the United States. § 2386. In another section, near the conclusion of the chapter and following all the provisions affecting the question before us, it declares that 'no title shall be acquired under the foregoing provisions of this chapter to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws.' § 2392.

"It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its mines of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. . . . We also say lands known at the time of the sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land in which years afterwards rich deposits of mineral may be discovered. . . .

"In the present case there is no dispute as to the mineral character of the land claimed by the plaintiff. It is upon the alleged prior occupation of it for trade and business, the same being within the settlement or town site of Deadwood, that the defendant relies as giving him a better right to the property. But the title to the land being in the United States, its occupation for trade or business did not and could not initiate any right to it, the same being mineral land, nor delay proceedings for acquisition of the title under the laws providing for the sale of lands of that character. And those proceedings had gone so far as to vest in the plaintiff a right to the title, before any steps were taken by the probate judge of the county to enter the town site at the local land office. The complaint alleges, and the answer admits, that on the 20th of November, 1877, the plaintiff applied to the United States land office at Deadwood to enter the lands as a placer mining land, and that on the 31st of January, 1878, he did enter it as such by paying the government price therefor. No adverse claim was ever filed with the register and receiver of the local land office, and the entry was never cancelled nor disapproved by the officers of the Land Department at Washington. The right of the government, therefore, passed to him; and though its deed, that is, its patent, was not issued to him until after January 31, 1882, the certificate of purchase which was given to him upon the entry was, so far as the acquisition of title by any other party was concerned, equivalent to a patent. It was not until the 28th of July following that the probate judge entered the town site. The land had then ceased to be the subject of sale by the government. It was no longer its property; it held the legal title only in trust for the holder of the certificate."

It seems that there may be an entry of a town site, though within its limits mineral lands are found, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation and improvement for residences or business under the township title.

Sparks v. Pierce, 115, 408 (1885). Facts substantially the same as in *Deffeback v. Hawke*, the decision in which case is followed.

Davis v. Weibbold, 139, 507 (1891). Action for possession of min-

ing land. Plaintiff relied on a patent for mining ground, dated Jan. 15, 1880, entry and payment having been made on 19th of September, 1878. The patent excepted and excluded from the grant "all town property rights upon the surface, and all houses, buildings, structures, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above described premises not belonging to the grantee herein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same."

Defendant claimed under a town-site patent of the city of Butte of 25th September, 1877, granted in accordance with the acts of March 2, 1867, and April 24, 1870, and the granting clause of which contained this provision: "No title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws of Congress."

Defendant offered to prove that, at the time the town-site patent issued, the premises were not known to be valuable for minerals. This was objected to on the ground that plaintiff's patent established that the ground was mineral and could not be granted for a town site, which objection was sustained. This was *held* to be error. This case differs from *Deffebach v. Hawke* in that in the latter there was no dispute as to the mineral character of the land at the time when the town site was entered at the Land Office. Here it is sought to prove that the land was not known to be valuable for minerals, and if that was the case, the defendant cannot be deprived of his title under the town-site patent.

Field, J.: "The declaration that 'no title shall be acquired' under the provisions relating to such town sites, and the sale of lands therein 'to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws,' would seem on first impression to constitute a reservation of such mines in the land sold, and of mining claims on them, to the United States; but such is not the necessary meaning of the terms used; in strictness they import only that the provisions by which the title to the land in such town sites is transferred shall not be the means of passing a title also to mines of gold, silver, cinnabar or copper in the land, or to valid mining claims or possessions thereon. They are to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification uniformly accompanying exceptions in acts of Congress of mineral lands from grant or sale. Thus read they must be held, we think, merely to prohibit the passage of title under the provisions of the town-site laws to mines of gold, silver, cinnabar or copper, which are known to exist, on the issue of the town-site patent, and to mining claims and mining possessions, in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth. The exceptions of mineral lands from pre-emption and settlement and from grants to States for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, are not held to exclude all lands in which all minerals may be found, but only those where the

mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant."

"It is not necessary in this case to state in what manner it must be shown that the existence of mines was known at the time the patent for the town site was issued. If the mining patent states any initiatory steps in acquiring title which antedate the title of the town site, that may suffice in an action at law. In the absence of such statement, the development and working of a mine would be a controlling fact; so also perhaps would be the location of the claim patented and notice thereof required by law, or the custom of miners. But in this case the patent does not show any such initiatory steps: it merely refers to the entry of the mining claim, and that was after the patent was issued to the town site."

"The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department, resting for their fitness only upon the judgment of those officers."

"It is not perceived where the jurisdiction exists under the laws of the United States to grant a patent for a mine on lands owned by private individuals — which was the case here — if the lots for which the defendants received a deed were included within the town-site patent and the location of the mining claim was subsequently made." This is not inconsistent with *Steel v. Smelting Co.*, 106 U. S. 447, in which case the town site was yet unpatented.

Patents are conclusive, when assailed collaterally, "of all matters of fact necessary to their issue, where the Department had jurisdiction to act upon such matters and to determine them; but if the lands patented were not at the time public property, having been previously disposed of, or no provision had been made for their sale or other disposition, or they had been reserved from sale, the Department had no jurisdiction to transfer the land, and their attempted conveyance by patent is inoperative and void, no matter with what seeming regularity the forms of law have been observed."

Dower v. Richards, 151, 658 (1894), affirming *Richards v. Dower*, 81 Cal. 44, *post*. Gray, J.: "It is established by former decisions of this court, that, under the acts of Congress which govern this case, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent."

Carter v. Thompson, 65 Fed. 329 (1894), C. C. D. Mont. The issuing a patent for a town site is a determination by the Land Department that the land included therein is not mineral. This determination is conclusive, in the absence of fraud, imposition, or mistake.

It cannot be attacked in a collateral proceeding. A person claiming under a placer location, made twenty years after the town-site patent, will not be heard, in an action to quiet title, to allege the mineral character of the land. The only way the patent can be attacked is by direct proceedings instituted by the United States on the ground of fraud or mistake.¹

Arizona. *Tombstone Town Site Cases*, 15 Pac. 26 (1887). A patent to a town site will prevail over a subsequent patent to a mining claim if the land was not known to be mineral at the date of the entry of the town site.

A notice of location of the ground was filed Feb. 25, 1879. It was so uncertain that the land could not be identified and was aided by no evidence. The record was amended on Nov. 20, 1880, and a patent for the land described in the amendment, as a mining claim, issued Aug. 15, 1882. A town-site covering the land was entered April 9, 1880. This latter prevailed.

There being no evidence that the land was known to contain mineral deposits at the date of the town-site entry, or that any mine existed prior thereto, or that there was any possession under existing laws, the existence of an invalid location will not determine that fact against the town-site patent. The subsequent discovery of minerals will not defeat the town-site patent.

California. *Dower v. Richards*, 73, 477 (1887). An owner of a lot under a town-site patent (which excepted gold mines from its operations), issued by the United States prior to the passage of the act of 1872, and in which a gold quartz ledge was known to exist at the date of the patent, has a title in fee simple to the land not actually included in the ledge, and a third person, for the purpose of working the ledge, has no right without his consent to run a tunnel under the portion of his land not included in the ledge.

Richards v. Dower, 81, 44 (1889), affirmed in *Dower v. Richards*, 151 U. S. 658, *ante*. Under the act of Congress of 1867 "a mine is not reserved unless it is not only known, but known to be valuable, at the date of the patent, or discovered to be so before the occupation or improvement of the lots containing them for residence or business under the town-site title." "One essential requisite of a gold mine is a natural deposit of rock or earth containing a sufficient quantity of gold to admit of profitable working." The burden of proof is on the one setting up a title to a mine under the reservation. If the ledge had been worked prior to the patent, but had been abandoned, it cannot be presumed to have contained a valuable deposit at the date of the patent. When the evidence is sufficient to show an intention to abandon the mine as having been valueless, the *possessio pedis* by the

¹ The position taken in this case does not agree with *Davis v. Weibbold*, *ante*. The issuing of a town-site patent is not conclusive of the character of the land, and, as has been seen, it has been the practice of the Land Department not to consider the character of the land in issuing such patents. It is out of the jurisdiction

of the Department to convey known mineral lands by town-site grant, and a town-site patent would be void as to such lands, because they are reserved by law out of the town-site grant. Of course, as to patents issued after March 3, 1891, the act of that date governs.

miners of shafts, tunnels, inclines, dumps, and slopes on the vein, if continuing until the date of the town-site patent, would not amount to a mining claim, or have the effect of preventing the land on which they were situated from passing by the patent.

Smith v. Hill, 89, 122 (1891). In order to except a mine from a town-site grant under Rev. Stats. 2892, it must have been a paying mine known to exist at the time, or one which there was good reason to believe existed.

Some mining had been done on the land in question from 1872 to 1874. It subsequently ceased because it would not pay, and the mine appeared to be worked out in 1879 when the town-site patent issued. This latter prevailed over a mining location made in 1887.

McCormick v. Sutton, 97, 373 (1893). After a patent has regularly issued for a town site, discovery of mineral thereon will not give the mining claimant a right as against the grantee of the town, although the discovery was made before the occupancy of the lot for business or residence purposes. The town-site patent conveys a perfect title in fee except as to such land as was known to contain valuable mines before the issuance of the patent.

Poire v. Wells, 6, 406 (1882). Land embraced within a Colorado town site on the public domain when unoccupied is not exempt from location and sale for mining purposes. Whether there are prior rights of occupancy which would be interfered with by the working of such mines is a matter properly cognizable by the Land Department.

Suessenbach v. First Nat. Bank, 5, 477 (1889). The locators Dakota of a placer mining claim, having an understanding with adjoining locators by which they were to lay out a town on their claims, conveyed a lot in the city of Deadwood, being part of their claim, to a banker, who erected a banking house thereon. The grantees of the original locators, when they obtained a patent for the whole claim, held subject to a trust in favor of the grantees of this lot to the extent of their conveyance. It was not the duty of the latter to file an adverse claim.

Talbott v. King, 6, 76 (1886). Action in the nature of Montana ejectment. Plaintiffs claimed by virtue of a patent for a lode claim issued in 1881, in pursuance of a location alleged to have been made April 16, 1875. This patent contained the following exceptions: "Excepting and excluding, however, from these presents all town property rights upon the surface, and there are hereby expressly excepted and excluded from the same all houses, buildings, structures, lots, streets, alleys, or other municipal improvements on the surface of the above described premises, not belonging to the grantee herein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same." The defendant claimed under a town-site patent issued Sept. 26, 1877, containing the following: "No title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws of Congress." It was contended that the ground had been used and possessed as town lots since 1866. Judgment was given for the plaintiff. "There was no law authorizing the Land Department to

except the surface ground from the conveyance or in any other manner to abridge the title of the purchaser; and in so doing it exceeded its authority, and its act to that extent is void and of no effect upon the property conveyed."

"A valid location is equivalent to a contract of purchase. The right to occupy and purchase means the right to acquire a full title. The mineral lands are declared open to occupation and purchase. The location together with the necessary work is the purchase, and the patent is the evidence of the title so acquired. The location therefore has the effect of a grant from the government to the locator; and this grant cannot be defeated or abridged by an unauthorized exception contained in the patent, for the patent must always be in accordance with and the consummation of the grant evidenced by a valid location." Under Rev. Stats. 2386, the possessory title to a mine is superior to that of a lot owner under the town-site act. "The occupation of the mineral lands as and for the purposes of a town lot, is of no effect as against a valid mining claim location, and no rights or equities flow therefrom. The statute expressly forbids the acquisition of title to any mine, mining claim, or possession by virtue of such occupation and a town-site patent issued in pursuance thereof." The ground having been located as a mining claim in 1875, no title therein passed by a town-site patent in 1877. The claim of occupation by the defendants from 1866 was a claim of right of possession merely, and should, if they wish to avail themselves of it, have been made the subject of an adverse claim.

The validity of the location of the mining claim cannot be questioned in this proceeding. The patent is conclusive of that. The act of the Department in issuing a patent is an adjudication, and like a judgment is final as to all matters necessarily included in and determined by it.

Butte City Smoke House Lode Cases, 6, 397 (1887). Same in facts as *Talbott v. King*, the decision in which case is followed and affirmed.

The town site took hold of the non-mineral lands included within its limits, but did not touch or in any manner affect the mining claims therein. There is not, and cannot be, any conflict between a town site and a mining patent.

King v. Thomas, 6, 409 (1887). Butte town-site case; same decision as in *Talbott v. King* and *Butte City Smoke House Lode Cases*. Application for Butte City town-site patent, June 10, 1876; final entry, July 25, 1876; patent issued, Sept. 26, 1877; Silver King lode located, March 14, 1877; patented, Sept. 13, 1881.

Evidence that land embraced within the town-site patent was non-mineral was inadmissible.

Murray v. City of Butte, 7, 61 (1887). Ejectment for land comprised in streets of the city, plaintiff claiming under patent for mineral lands. Defendant claimed only an easement, and offered to prove the existence of the highways at the time of the location. The rejection of this was error. Rev. Stats. 2477, "The right of way for the construction of highways over public lands not reserved for public uses is hereby granted," gave an easement to the defendants. It was not necessary for them to file an adverse claim to plaintiff's application for a patent. "We think the true rule of law is, that where a person holds

a valid grant from the government, he need not concern himself about any subsequent attempt by the government to convey the same property to another person."

Chambers v. Jones, 17, 156 (1895). Plaintiff in ejectment claimed under a patent issued March 15, 1883, for a mining claim located March 23, 1877. Defendant claimed under the Butler town-site patent which issued Sept. 26, 1877. Plaintiff's title was held to prevail under *Butte City Smoke House Cases*, 6 Mont. 397, they having connected their patent with the location.

Defendant was not permitted to show that the location notice was defective. The patent was conclusive of its validity.

Nevada. Courchaine v. Bullion M. Co., 4, 369 (1868). Defendant located a certain ledge and land in 1859 for mining purposes. Plaintiff, some two years later, located the land as town lots, and took steps to acquire title from the general government, filed his declaratory statement, gave notice of his intention to pre-empt, and the register and receiver had decided in favor of his right. *Held*, he could maintain trespass against defendant for depositing rock, dirt, and refuse upon the premises. When the government has declared, or by its proper tribunals decided, that a particular person is entitled to the possession, such declaration or decision is, in the absence of fraud, high evidence of his right to such possession, certainly superior to that which is acquired simply by priority of possession unaccompanied by any recognition from the government.

Act of Congress, July 1, 1864, provides that "where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession and the necessary use thereof." "Although this law seems to make the lot owner's title subordinate to the miner's right, whenever the use of the lot becomes necessary to enable the latter to work the mine, still the question whether such necessity exists or not in any particular case is to be determined by the jury."

LAND OFFICE DECISIONS.

Where land has been returned as "coal land" by the surveyor-general, it cannot be entered as a town site until a hearing has been held to determine the character of the land, whether mineral or agricultural. *Copp*, 339 (1874).

A town site may be located on mineral land, but the lot owner takes subject to recognized possession and necessary use of the mineral veins and surface thereof. The *quasi* title of the lot owner must give way to the title of the mineral owner, whenever the use thereof is necessary for mining purposes. Whether the lot owner takes subject to the rights of the mineral claimant as to the surface must depend upon priority of occupation. The recognized right of a lot owner may not be destroyed by the subsequent discovery of a vein of mineral that may have its course through his lot. The mineral claimant's title is not affected by issuance of a patent for the town site. The question is still one of priority of occupation. And this, as well as the question of

what is necessary use of the surface by the mineral claimant, is a question which cannot be adjudicated by the Land Department, but should be submitted to a jury of the neighborhood. *Rico Townsite*, 1 L. D. 556 (1882); *M. A. & E. Hickey*, 3 L. D. 83 (1884).

Town sites may be located on mineral land, and the town-site claimants will hold subject to the right of mineral claimants, including owners of mill sites on land non-mineral and not contiguous to their lodes. Protests filed by such owners against issue of patent for the town site will be dismissed. "Questions of priority of occupation, as well as the question what is necessary use of such surface by the mineral claimants, ought to be submitted to a jury of the neighborhood where such controversies arise." *Esler v. Townsite of Cooke*, 4 L. D. 212 (1885).

The clause reserving rights should not be inserted in a patent for any mining claim, but the practice of the Land Office should be governed by the principles established in *Deffebach v. Hawke*, 115 U. S. 392; 5 L. D. 256 (1886).

There is no authority of law for the insertion in a mineral patent of a clause reserving the rights of a town site. A town-site patent is inoperative as to all lands known at the time of the entry to be valuable for mineral, or discovered to be of such character prior to the occupation or improvement of the land for residence or business under the town-site laws. *W. A. Simmons*, 7 L. D. 283 (1888); *Antediluvian L. & M. Site*, 8 L. D. 602 (1889).

The occupancy of land by town-site settlers is no bar to its entry under the mining laws, provided the land is mineral and belongs to the United States. *James D. Rankin*, 7 L. D. 411 (1888).

Under a mineral application for land partly included within a prior town-site patent, the claim must be restricted to the land not in conflict. In the absence of an allegation or offer to prove that the land in conflict was of known mineral character prior to the issuance of the town-site patent, the record will not justify proceedings against said patent, or adverse to rights claimed thereunder; but on due showing a hearing may be ordered to determine whether suit to vacate the patent should be advised. The issuance of patent terminates the jurisdiction of the Department over the land covered thereby, and such patent can be invalidated by judicial proceedings only.

A subsequent discovery of mineral cannot affect the title as it passed at the time of sale. *Thomas J. Laney*, 9 L. D. 83 (1889).

Under an allegation properly corroborated, that a tract, patented under a town-site entry, includes a mine of valuable ore, and that such mine was well known at the date of entry and issuance of patent, the Department may order a hearing to test the truthfulness of the charge with a view to subsequent judicial proceedings. Section 16 of the act of March 3, 1891, is not retrospective in its operation. *Plymouth Lode*, 12 L. D. 513 (1891).

Land included within an outstanding town-site patent is not subject to mineral entry; but an opportunity may be afforded the mineral applicant in such case to show that the mineral character of the land was known at the date of the town-site entry and patent, with a view to subsequent judicial proceedings to vacate said patent.

The provisions of section 16, act of March 3, 1891, are only applicable to entries made after the passage of said act. *Protector Lode*, 12 L. D. 662 (1891).

The issuance of a town-site patent for land that contains a known lode claim conveys no title to said claim; but such patent, while outstanding, operates to remove the land described therein and the title thereto from the jurisdiction of the Department, and effectually precludes the issuance of a patent for said mining claim.

Where no exception of any portion of the surface ground is made from the land described in a town-site patent, departmental authority over such land and the title thereto terminates with the issuance of said patent, even though such instrument may in terms declare that no title shall be acquired thereby to any mine or valid mining claim, and it shall subsequently appear that it covers land containing a lode claim known to exist at the date of the town-site entry and patent.

Where it appears that a town-site patent has issued for land containing a known lode claim, based on a recorded location made prior to the town-site entry, judicial proceedings should be instituted looking to the vacation of said patent, so far as in conflict with said mining claim, and the subsequent issuance of proper title to the mineral claimant. Section 16, act of March 3, 1891, is not retroactive in its operation, and hence cannot affect cases pending at the passage of said act. *Pacific Slope Lode*, 12 L. D. 686 (1891).

Although a town-site patent conveys no title to a known lode or mining claim, it can only be invalidated by judicial proceedings, and with the view to such action a hearing may be properly ordered on due showing of the existence of such lode or claim within a patented town site. *Cameron Lode*, 18 L. D. 869 (1891).

In case of a patented town-site entry of land containing a valuable mineral deposit, known to exist prior to the town-site application, and subsequently entered by a mineral claimant, the Department, to obviate judicial proceedings, may accept a reconveyance of the land erroneously patented, and thus acquire jurisdiction to pass upon the validity of the mineral entry. *Pederson Lode v. Black Hawk Townsite*, 14 L. D. 186 (1892).

Land which had been worked for gold, but abandoned, is not excepted from a town-site entry. "A vein or lode may be said to be known to exist when its location has been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record in the district." *Noyes v. Mantle*, 127 U. S. 348. Besides, in this case, though the land contained minerals, it was not shown to be valuable. *Duffy Quartz Mine*, 18 L. D. 259.

II. SCHOOL LAND GRANTS.

Congress has by acts passed at different times granted to the different Territories, usually when about to become States, certain sections of land for the use of public schools or universities. In all of these there are provisions that in case these lands have been

taken up under other laws, other portions of the public lands may be taken in lieu thereof.

By the act of March 3, 1853, sections 16 and 36 in each township were granted to California for this purpose. By the seventh section of this act it was provided that "where any settlement by the erection of a dwelling house or the cultivation of any portion of the land shall be made upon the 16th and 36th sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof, etc. . . . nor shall any person obtain the benefits of this act by a settlement or location on mineral lands." Similar grants were made to California by act of July 2, 1862; Nevada,¹ by the Enabling Act of March 21, 1864; and to New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, Wyoming, and Washington, by Rev. Stats. 1946-47.

The land thus acquired by the States has been by them in turn granted to individuals, and controversies have thus arisen between holders of the State patents and those claiming rights under the mineral law.

No title under these acts passed until the land was surveyed and sectionized; consequently even when no express reservation of mineral land was made, mineral land which was not sectionized before the passage of the act of July 4, 1866, became by that act excepted from the grant, and the State could acquire no title to it. But the grant to California provides that mineral land shall not be sectionized, and that act has been construed to convey no title to mineral lands to the State. No school patent of that State, therefore, for mineral lands can pass title. Besides this, miners, by erecting dwelling houses upon their locations before survey brought themselves within section 7 above quoted. The early California cases taking a contrary view are overruled by the decisions of the federal courts.

Mineral land in this connection has the same meaning as was given to it in Division I. of this chapter. It is land known to be valuable for its mineral at the date of the survey. If it was so known, it remained the property of the United States, and conse-

¹ The legislature of Nevada, by act of March 3, 1877, p. 102, disclaims any interest in mining lands selected by the State, but provides for the protection of the improvements of those who have purchased the land from the State.

quently open to exploration, occupation, and purchase under the mineral law. If it was not known to be valuable at the time of the survey, it passed to the State, and the subsequent discovery of minerals in profitable quantity would not divest the title of the State or its grantee. On the other hand, as the State had a right to other land in lieu of that which contained known minerals, the subsequent exhaustion of the minerals on such land does not create a title in the State.

Where the act does not by its terms pass the fee simple, and a certificate or patent is required to complete title, the listing of selected lands and certification by the Secretary of the Interior, under Rev. Stats. 2449, is conclusive of their non-mineral character.¹

Coal lands are mineral lands within the meaning of the law on this subject.

United States. *Cooper v. Roberts*, 18 How. 173 (1855). From the grant made to Michigan, on its admission to the Union, of section 16 in every township of public lands, mineral lands were not excepted.

Heydenfeldt v. Daney G. & S. M. Co., 93, 634 (1876), affirming s. c. 10 Nev. 290. The Nevada Enabling Act, approved March 21, 1864, granted to that State sections 16 and 36 in every township for the support of common schools. The land at that date had not been surveyed, nor was it surveyed until after the passage of the act of July 26, 1866. On July 14, 1868, a patent was issued by the State to plaintiff's grantor for a part of section 16, etc. On March 2, 1874, a patent for a lode mining claim covering this ground was issued by the United States to the defendant, who at the beginning of the suit was in possession. The land in controversy was mineral land. No title passed by the State grant until the lands were surveyed. By the act of 1866 Congress disposed of this land as mineral land, and the State upon the survey acquired no title, but was entitled to other land equal in quantity. The title of the defendant consequently prevailed. Besides, the act of Congress of July 4, 1866, reserved from sale all mineral lands in the State, and this act was recognized and accepted by the legislature of the State by the act of Feb. 13, 1867.

Water & Mining Co. v. Bugbey, 96, 165 (1877). The act of March 3, 1853 (10 Stat. 244), granted to California for school purposes the public land within sections 16 and 36 in each township in that State, except so much as had been actually settled before survey, and as to which the settler claimed the right of pre-emption within three months after the return of the plats of the survey to the local land office. If he failed to make good his claim, the title to the land embraced by his

¹ On the subject of State selections see Circular July 9, 1894, 19 L. D. 23; Circular Nov. 26, 1896, 23 L. D. 459.

settlement vested in the State as of the date of the completion of the survey.

The survey of the lands in controversy was completed May 19, 1866, and the plats deposited in the Land Office June 16, 1866. No claim of right of pre-emption was made. In this case the title of the State to the demanded premises having, in the absence of settlers' claims, become absolute May 19, 1866, the United States had parted with all interest in and control over the property, and a mining company could under the act of July 26, 1866, acquire no right to them.

Ivanhoe M. Co. v. Keystone Con. M. Co., 102, 167 (1880). The grant of the 16th and 36th sections of public land to the State of California for school purposes, made by the act of March 3, 1853, was not intended to cover mineral lands. Such lands were by the settled policy of the general government excluded from all grants. A settlement within the meaning of section 7 of that act is not required, either in regard to the acts to be done or the qualification of the settler, to be precisely the same as that whereby a pre-emption right can be secured under the act of Sept. 4, 1841.

Mullan v. United States, 118, 271 (1886), affirming *United States v. Mullan*, 10 Fed. 785. Where the State selects a tract of land in lieu of a like quantity of unavailable school lands, which tract so selected is not subject to selection, and the same is listed to the State by the Secretary of the Interior, and by the State thereupon patented to private parties, a court of equity, upon a bill filed by the United States, will annul the selection, listing, and patent, whether the unlawful acts arose out of fraud, inadvertence, or mistake, or errors of law committed by the officers upon known facts, as to the authority of the State to select or the Secretary of the Interior to list over.

Waite, C. J.: "The first statute which made any reference to minerals on the public lands was that of Sept. 4, 1841 (5 Stat. 453, 455, ch. 16, § 10), which provided that no pre-emption entry should be made on 'lands on which are situated any known salines or mines;' and by the act of July 1, 1864 (13 Stat. 343, ch. 205, § 1), it was provided that 'any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which as "mines" are excluded from the pre-emption act of 1841, and which under past legislation are not liable to ordinary private entry,' might be disposed of at a price not less than twenty dollars an acre. This is clearly a legislative declaration that 'known' coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested. Whatever doubt there may be as to the effect of this declaration on past transactions, it is clear that after it was made, coal lands were to be treated as mineral lands. That the land now in dispute was 'known' coal land at the time it was selected, no one can doubt." It was, consequently, not open to the State for selection.

Buena Vista Pet. Co. v. Tulare O. & M. Co., 67 Fed. 226 (1895), C. S. D. Cal. Congress, by the act of July 2, 1862, having granted to California one hundred and fifty thousand acres of public land, the State by its agent, in accordance with the provisions of that act, and pursuant to State legislation enacted to take the benefit of the grant,

selected the land in controversy as part thereof. This was duly certified and listed to the State by the Secretary of the Interior on Jan. 3, 1878, in part satisfaction of the congressional grant. That grant excluded mineral land. The action of the Secretary of the Interior was a conclusive determination of the non-mineral character of the land, and it could not be called in question by mineral claimants under locations made subsequent to the date of the listing by the Department.

Johnston v. Morris, 72 Fed. 890 (1896). When school lands surveyed by a United States deputy surveyor are certified by him to be mineral, and his field-notes and plats are approved by the surveyor-general and the Commissioner of the General Land Office, and filed in the Land Office, this is a sufficient determination that the lands are mineral in character to give the State a right to select other lands as indemnity for the loss.¹

Burdge v. Smith, 14, 380 (1859). An act of Congress granted to California seventy-two sections for the use of a seminary of learning, provided, however, that no mineral lands, etc., shall be subject to such selection. The location of land under this grant gives no title if the land is mineral.

Al Yew v. Choate, 24, 562 (1864). Where land is located under a State school land warrant, and a patent is issued after all the proceedings required by law have been taken, the patent is the record of the judgment of the State by its officers duly appointed for the purpose, that the land embraced in the patent is not mineral land within section 8 of the act of April 16, 1859. The fact that the patentee finds gold on the land in sufficient quantity to induce him to mine it does not destroy the verity of the record, nor make the land mineral land within said section 8.

Wedekind v. Craig, 56, 642 (1880). Defendant located the ground in question as mining ground in 1852, and in 1853 settled thereon, built a dwelling, enclosed the ground, and lived thereon. In 1871 the ground was sectionized by the United States, being section 36, etc. Plaintiff applied to the State for a patent therefor in 1874, under the act of March 28, 1874, and a patent was issued to him by the State. Held, the latter passed no title. The defendant's settlement brought the case within section 7 of the act of 1853, so that other land must be selected by the State in lieu thereof, no title passing to it. The settlement is not confined to pre-emption settlements, or to land subject to pre-emption. "The settlement of the latter must be by inhabiting and improving the same, and by erecting a dwelling house; whereas the settlement mentioned in the seventh section of the act of 1853 is by the erection of a dwelling house, or by the cultivation of a portion of the land. Nor in our opinion is the soundness of the conclusion here reached affected by the last clause of the seventh section of the act of 1853, which is in these words: 'Nor shall any person obtain the benefits of this act by a settlement or location on mineral lands.' The meaning of this is that no person shall acquire a title to mineral lands under the provisions of the act by a settlement or location on such lands. Still, in our judgment, a settlement of the

¹ Followed in *State of California*, 23 L. D. 423 (1896).

character above stated prevents the title from passing from the State under the provision of the seventh section." On rehearing, the above was affirmed on the authority of *Ivanhoe M. Co. v. Keystone Con. M. Co.*, 102 U. S. 167.

Hermocilla v. Hubbell, 89, 5 (1891). Lands known to be valuable for minerals at the time of the grant to the State contained in the act of March 3, 1853, were excluded from the grant by the settled policy of the government. The State having a right to other land in lieu thereof, did not become entitled to the original land upon the exhaustion of the minerals therein.

Heydenfeldt v. Daney G. & S. Mining Co., 10, 290 Nevada.

(1875), affirmed in s. c. 93 U. S. 634, *ante*. Assuming that the proper construction of the Enabling Act of March 21, 1864, is that the grant of the 16th and 36th sections to the State for school purposes took effect absolutely upon the admission of the State into the Union, still Congress could thereafter, with the consent of the State, and prior to the disposal by the State of the lands embraced in those sections at any time prior to the survey, change the terms of the grant. Section 5 of the act of Congress of July 4, 1866 (14 Stat. 85), was such a change reserving mineral lands from the grant, and the State, by the act of Feb. 13, 1867, consented thereto, relinquishing its rights to the mineral lands to accept other lands in lieu thereof. A patent issued by the State on July 14, 1868 (under the statute authorizing the conveyance of lands granted by the Enabling Act), for certain land which had been previously located as mining land, passed no title.

Washington. Wheeler v. Smith, 32 Pac. 784 (1893). Where, in a contest on an adverse claim, it appeared that the claim was a part of a section numbered 36, the court held that the claims thereto were invalid, on the ground that such sections when surveyed became the property of the State for school purposes, under the act of Congress of March 2, 1853. "This third point was not suggested by counsel on either side; but in view of the interest of the State in these lands, we deem ourselves justifiable in adducing it as one of the reasons why these claims should not be sustained."

LAND OFFICE DECISIONS.

Mineral lands are excepted from the grant of the 16th and 36th sections for school purposes made by the Nevada Enabling Act of March 21, 1864. This construction is prescribed by the Joint Resolution of Congress, Jan. 31, 1865 (13 Stat. 567). The State register is entitled to select other lands in place of those found to be mineral. *Copp*, 76 (1870).

The grant to the State of California of sections 16 and 36 in each township for school purposes, contained in the act of March 3, 1853, is a grant *in presenti*, but title to the specific tracts does not vest thereunder until they have been surveyed and sectionized. Before survey Congress had power to change, modify, or repeal the grant and make other disposition of the land. The exception from the grant in section 7 of the act, of land upon which settlement has been made

by cultivation or the erection of a dwelling house before survey, covers any settlement including a mining village.

Mineral lands are excepted from the grant of sections 16 and 36. The act of July 26, 1866, provides an exclusive method for appropriating the mineral lands of the United States. *Keystone Cons. M. Co. v. California*, Copp, 101 (1873).

The title to sections 16 and 36 vests in the State of California under act of March 3, 1853, upon survey, although they are mineral, provided their mineral character was at that time unknown. Copp, 212 (1877).

Land in Colorado known to be mineral previous to the admission of the State is excepted from the grant of sections 16 and 36 for school purposes. *Silver Cliff v. Colorado*, Copp, 261 (1879).

Section 14 of the act of July 25, 1868, providing for a temporary government for the Territory of Wyoming, makes no exception in reserving sections 16 and 36 for school purposes, and the Land Office is consequently without authority to dispose of those sections as mineral lands. Copp, 337 (1873).

Coal lands are mineral lands within the reservation from a school grant. Copp, 340 (1874); *id.* 341 (1877); *Montana v. Buley*, 23 L. D. 116 (1896).

Sections 16 and 36 appearing as mineral at date of survey do not pass under the grant, but the State is entitled to indemnity therefor. *State of Colorado*, 6 L. D. 412 (1887).

The act of March 2, 1819, by the first section, of which section 16 in every township was granted to Alabama for school purposes, contains no reservation of mineral lands, and no subsequent statute has altered the effect thereof.

The act of March 3, 1883, did not prevent the selection by the State as indemnity school lands, of lands reported valuable for coal before the passage of the act. *State of Alabama*, 6 L. D. 493 (1888).

Though the language of a decision of the Land Office may in terms purport to definitely settle the question as to whether a certain section of land was excepted from the school grant because of its known mineral character, yet such question is in fact only *res judicata* as to the land actually involved in the case wherein such decision was rendered. *Boulder & Buffalo M. Co.*, 7 L. D. 54 (1888).

The State is entitled to sections 16 and 36 under the school grant, if said sections were not known to contain mineral when the survey was approved, and the discovery of mineral on said lands after the survey was approved would not defeat the title of the State. Title to school lands would not, however, pass to the State by a survey grossly irregular, apparently inaccurate, and subsequently withdrawn and suspended; nor would such a survey preclude the location of a mining claim on land returned therein as section 36. *Virginia Lode*, 7 L. D. 459 (1888).

The title of the State under the school grant yests, if at all, at the date of survey; and if the land is in fact mineral, though not then known to be such, the subsequent discovery of its mineral character will not divest the title which has already passed.

If a settler on school land prior to survey abandons his claim thereto,

a third party cannot set up the fact of such settlement to defeat the title of the State. The case of the *State of Colorado*, 7 L. D. 490, overruled. *Abraham L. Miner*, 9 L. D. 408 (1889).

A mineral applicant for lands in section 16 in the State of Colorado may submit proof after due notice to the State that the land applied for was of known mineral character prior to and at the date of the admission of the State to the Union. *Fleetwood Lode*, 12 L. D. 604 (1891); *Frees v. Colorado*, 22 L. D. 510 (1896).

The act of March 21, 1864, providing for the admission of Nevada into the Union and for a grant of school lands, did not pass title to known mineral lands, although such lands were not in terms excepted from the grant. *Keystone L. & M. Site v. State of Nevada*, 15 L. D. 259 (1892).

In determining whether land is excepted from the school grant to California on account of its mineral character, the subject of inquiry is whether the land was mineral or not at the date of survey. *Pereira v. Jucks*, 15 L. D. 273 (1892).

Lands chiefly valuable for deposits of ordinary building stone are not excepted as mineral land from grants to a State for school purposes. The fact that the act of Aug. 4, 1892, provides that certain kinds of stone quarries may be entered under the placer laws, does not warrant the finding that such stone quarries constitute mineral lands in the sense in which such lands are held to be excepted from grants. *South Dakota v. Vermont Stone Co.*, 16 L. D. 263 (1893). But where final entry of such land as a placer claim has been allowed, it will be thereby excepted from the subsequent operation of a school grant. *Paris Gibson*, 21 L. D. 327 (1895).

Lands known to be mineral at the date of the admission of Washington to the Union are excepted from the grant to the State, which may select other land in lieu thereof. *Washington v. McBride*, 18 L. D. 199 (1894).

The taking of a few wagon loads of coal from surface outcropping does not establish the existence of valuable mines so as to make the land known mineral land. *Frees v. Colorado*, 22 L. D. 510 (1896).

Under act of Congress, Feb. 28, 1891, all States are entitled to select indemnity for school sections lost to the State by reason of their mineral character. *State of California*, 23 L. D. 423 (1896).

III. LAND GRANTS TO RAILROADS.

Congress by various acts has granted to certain railroad corporations, land upon which to construct their roads, and also alternate sections of land lying contiguous to the road. Such are the Pacific Railroad Acts of July 1, 1862, and July 21, 1864. These acts contain exceptions of such sections as are mineral lands (see also Rev. Stats. 2346). This exception or reservation is absolute without reference to whether the land was known to be mineral or not at the time of the grant. These grants took effect *in presenti*, but no mineral land passed by them. The character of the land

is decided by the Land Department, and the discovery of mineral at any time previous to the issuance of patent, or certification where patent is not required, will except the land from the grant.

This position has been constantly adhered to by the Department, patents being refused to the railroads where minerals have been discovered previous thereto; and this has been decided to be correct by the Supreme Court of the United States in *Barden v. Northern Pac. R. Co.*, 154 U. S. 288, by which a number of cases are overruled, in which it had been held that all land passed by the grant which was not known to be mineral at the time of the definite location of the road.¹

When, however, a patent issues to the railroad or its grantee, it is conclusive, and cannot be attacked by those who claim that the land included therein was known to be mineral at the date of the grant. The question is always investigated by the Land Office before issuing a patent to the railroad; that decision is final, and after the patent has issued, no application for a mineral patent for the land or any part of it will be entertained.

In determining the character of these lands, the same test is applied as in determining what lands may be located as mines as against agricultural or other claimants. This has been discussed elsewhere.² The procedure in the Land Office to determine the character of these lands is likewise the same.³

The exception in the acts does not apply to the land occupied by the roadbed which may be upon mineral land, but applies only to the contiguous alternate sections granted.

United States. *McLaughlin v. United States*, 107, 526 (1882). The patent in question, bearing date May 31, 1870, and issued to a railroad company, in professed compliance with the terms and conditions of the grant made by the acts commonly known as the Pacific Railroad Acts, out of which grant are excepted such sections as are mineral lands, covered lands which the bill alleged contained valuable quicksilver and cinnabar deposits, and were known to be mineral lands, when the grant was made and patent issued. This court, being satisfied that the material allegations of the bill are true, that as early as 1863 and since, cinnabar was mined upon the lands, and at the time of the application for a patent their character was known to the defendant, the agent of the company who now claims

¹ *Franeaur v. Newhouse*, 40 Fed. 618; 43 Fed. 236; and see dissenting opinion of Brewer, J., in *Barden v. Northern Pac. R. Co.*

² See page 376, *ante*.

³ But see also Circular July 9, 1894, 19 L. D. 21, and Circular Aug. 15, 1894, 19 L. D. 105; Act Feb. 26, 1895, 28 Stat. 683; 20 L. D. 350, 561, 571; 21 L. D. 65, 68, 108.

them under it, affirms the decree cancelling the patent and declaring his title to be null and void.

Western Pac. Railroad Co. v. United States, 108, 510 (1882). Same case as last reported under different name.

Cowell v. Lammers, 21 Fed. 200 (1884), C. C. D. Cal. On June 27, 1867, under the acts of Congress of July 1, 1862, and July 2, 1864, a patent regular on its face was issued for the northeast quarter of section 17, township 9, range E, Mount Diablo base and meridian, to the Central Pacific Railroad Company, to aid in the construction of its road. The patent expressly excepted all mineral lands, should any be found within the tract conveyed, but there was nothing to indicate that any part of such land was mineral land. In 1873 the company conveyed the land to M., who entered into possession, occupied, fenced, built upon, and cultivated the land until 1877, when he sold it to C., who also went into possession and cultivated and used the land. In 1881 L. entered upon a part of the land against the will of C., and claiming that it was mineral land, took up a mining claim thereon. *Held*, that L. could not by this unlawful intrusion initiate a right to a mining claim, and that the patent was conclusive when collaterally called in question, following *Atherton v. Fowler*, 96 U. S. 513; *Steel v. Smelting Co.*, 106 U. S. 447.

Northern Pac. R. Co. v. Sanders, 49 Fed. 129 (1892), C. C. Ap., 9th Circ.¹ The grant contained in sec. 3, act July 2, 1864, does not prevent persons taking up mining claims in the reserved lands after the filing of the map, but before the definite location of the road. It does not avail the railroad company that the lands so located are in fact non-mineral.

Northern Pac. R. Co. v. Cannon, 54 Fed. 252 (1893), C. C. Ap., 9th Circ.² The act of July 2, 1864, granting lands to appellant in aid of the construction of its railroad, did not prevent persons from taking up and locating mining claims in the reserved lands at any time before the line of the railroad was definitely fixed, and the fact that land not mineral was so taken up, located, and claimed as mineral land prior to that time was of no avail to the railroad company claiming the same under its grant. In this case the map showing the general route of the railroad was filed in the office of the Secretary of the Interior in 1872, the mineral patents under which appellees claimed issued in 1878, and the line of the railroad was definitely fixed and a plat thereof filed in the office of the Commissioner in 1882. The mineral patents were held to prevail over the title of the railroad company.

The railroad was not entitled to personal notice of proceedings for obtaining a mineral patent under Rev. Stats. 2325. Appellant had an opportunity to initiate a contest under Rev. Stats. 2325, and had it done so would have been entitled to personal notice of all proceedings thereafter taken.

Barden v. Northern Pac. R. Co., 154, 288 (1894). Lands discovered to be mineral at any time before issue of patent to the railroad are excepted from the grant, and this exception will be made from the patent.

Field, J.: "Mineral lands were not conveyed, but by the grant

¹ See *Barden v. N. P. R. Co.*, *post*.

² See *Barden v. N. P. R. Co.*, *post*.

itself and the subsequent resolution of Congress cited were specifically reserved to the United States and excepted from the operations of the grant. Therefore, they were not to be located at all, and if in fact located, they could not pass under the grant."

"It is difficult to perceive the principle upon which the term 'known' is sought to be inserted in the act of Congress, either to limit the extent of its grant or the extent of its mineral, though its purpose is apparent. It is to add to the convenience of the grantee and enhance the value of its grant. But to change the meaning of the act is not in the power of the plaintiff, and to insert by construction what is expressly excluded is in terms prohibited. Besides the impossibility, according to recognized rules of construction, of incorporating in a statute a new term, — one inconsistent with its express declarations — there are many reasons for holding that the omission of the word 'known,' as defining the extent of the mineral lands excluded, was purposely intended."

"Patents issued after an examination and determination of the fact by the government whether portions of the land embraced* in such grants did or did not contain other minerals have been held as conclusive in subsequent controversies, and of this we shall speak more fully hereafter; but grants in aid of railroads (and we speak of no other grants) before such determination and issue of a patent have never been held to pass other minerals than iron or coal, and it is only with other minerals, and with lands containing them, that we are concerned in this case." "The act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands and designate it in its conveyance. It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that Department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

"There are undoubtedly* many cases arising before the Land Department, in the disposition of the public lands, where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

California. *Doran v. Central Pac. R. Co.*, 24, 245 (1864). The right of way over a strip of land two hundred feet in width on each side of its road granted to the Central Pacific Railroad Company, by secs. 2 and 9, act of Congress, July 1, 1862, extends to and

covers all public land, whether mineral or not. The proviso in section 3 of this act, excepting mineral lands from its operation, refers to the alternate sections granted to the company and not to the right of way.

Mere occupants of mineral lands, who have entered the same for mining or other purposes, have no title or right under which they can maintain possession against the United States or its grantee.

Alford v. Barnum, 45, 482 (1873). The mere fact that land contains particles of gold or veins of gold-bearing rocks, does not necessarily impress it with the character of "mineral land" within the meaning of the acts of Congress of July 1, 1862, and July 2, 1864, granting alternate sections to the Pacific Railroad Company, but reserving mineral lands from the grant. It must at least be shown that the land contains minerals in quantities sufficient to render it available and valuable for mining purposes.

Gale v. Best, 78, 235 (1889).¹ "If a large body of public lands be subjected to sale or other disposition under a law which has merely a general reservation of such parts of those lands as may be found to be of a particular character, as swamp or mineral, then the Land Department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised. In such a case the patent can be attacked only by a direct proceeding, and by a person who connects himself directly with the government." A grant of lands to a railroad company by act of Congress excepted mineral lands. Patent was issued containing no reservation. One locating a mining claim could not, as against the patent, show that the land was mineral.

Montana. *Wilkinson v. Northern Pac. R. Co.*, 5, 538 (1885). The provision in section 3 of the act incorporating the railroad company, excepting mineral lands from the grant of alternate sections, does not refer to the grant of the right of way contained in section 2. Such right may extend over and cover mineral lands of the United States. If at the time the right of way attaches such mineral lands are unoccupied, a subsequent location thereof and patent therefor are inferior to the right of way of the company, and must yield to the superior title without resort to a court of equity to set aside the patent.

Nevada. *Merrill v. Dixon*, 15, 401 (1880). In order to show that land was mineral land, and as such excepted out of a grant to the Central Pacific Railroad Company, plaintiff offered to prove that the land had been returned and denominated "copper, gold, and silver bearing quartz" on the map of the township regularly made and filed by the United States surveyor. This was properly excluded. Mineral lands within the meaning of the act of Congress are those which are valuable for mining purposes.

LAND OFFICE DECISIONS.

The location of a mill site upon land granted to the Central Pacific Railroad Company after their rights took effect could create no adverse right thereto as against the company, the land being non-mineral. *Copp*, 90 (1872).

¹ Overrules *Chicago Quartz M. Co. v. Oliver*, 75 Cal. 194, and *Hunt v. Siese*, 75 Cal. 620.

Mineral lands are excepted from the grant to the Central Pacific Railroad Company, but the timber thereon within the ten mile limit is granted to the company, except so much as is necessary to support the improvements of mine-owners thereon. In patents for such mineral land exceptions of timber will be inserted accordingly. *Central Pac. R. Co. v. Mammoth Blue Gravel Co.*, Copp, 144 (1874).

Salt is a mineral, and lands containing valuable deposits of salt are excepted from the grant to the Central Pacific Railroad Company. *Eagle Salt Works*, Copp, 336 (1877).

Coal lands are included in the Union Pacific Railroad grant, and such lands may not be located under act of March 3, 1873. Copp, 338 (1873).

Where rights under the act of March 3, 1865 (as by possession, expenditure of money in developing and extracting coal), had attached to coal lands prior to the location of the Union Pacific Railroad over the same, these lands are excluded from the grant to the railroad. *Union Pac. R. Co. v. Crismon*, Copp, 340 (1875).

The exception of mineral lands from the grant to the Central Pacific Railroad Company includes only lands known to contain valuable minerals prior to issuance of patent. Where land was returned as agricultural, and patent duly issued therefor under the Central Pacific Railroad grant, an application for patent for the same as a mining claim will not be allowed to be filed. *Samuel W. Spong*, 5 L. D. 193 (1886).

A decision of the local officers holding certain tracts within the granted limits non-mineral in character, after hearing ordered to determine that question, will be approved in the absence of appeal. The failure of the company to list the said lands will not defeat the effect of such proceedings; but such listing may be required *nunc pro tunc*. *Central Pac. R. Co.*, 8 L. D. 30 (1889).

A hearing to determine the character of land claimed under a railroad grant, but returned as mineral, is not authorized in the absence of an application to select and due notice thereof. *Central Pac. R. Co.*, 9 L. D. 613 (1889).

The discovery of the mineral character of land at any time prior to the issuance of patent therefor, or certification where patent is not required, effectually excludes such land from a railroad grant which contains a provision excepting all mineral lands therefrom. "All the lands within the primary limits of a railroad grant do not necessarily pass to the railroad, but only such as are not within the exceptions named in the grant; and the Secretary of the Interior is clothed with the authority of determining in the first instance which lands pass by the grant, and which do not pass; and this he does by approving lists for certification or patent." "Patents issued under legislative grants *in presenti* do not operate to vest the title, but are intended to define or identify the land, and evidence the title vested by the grant."

"The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now this jurisdiction

is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company." *Central Pac. R. Co. v. Valentine*, 11 L. D. 238 (1890).

On the allegation, duly corroborated by affidavits, that certain land patented to a railroad company was in fact excepted from the grant by reason of its known mineral character, a hearing may be directed to ascertain whether the facts justify judicial proceedings for the recovery of title. *Bullock v. Central Pac. R. Co.*, 11 L. D. 590 (1890).

The patents issued to the Atlantic & Pacific Railroad Company for lands earned under its grant should contain in express terms an exclusion of "all mineral lands other than coal and iron lands." *Atlantic & Pac. R. Co.*, 12 L. D. 116 (1891).

"All mineral lands" are excluded from the grant to the Central Pacific Railroad Company, and until patent issues therefor the Department has authority to determine the character of land claimed under the grant; and this is true even though the company may have sold such land.

The authority of the Department to order a hearing on the petition of a mineral applicant for such land, is not abridged by a prior *ex parte* proceeding on behalf of the company, in which the land was found to be agricultural in character. *North Star M. Co. v. Central Pac. R. Co.*, 12 L. D. 608 (1891).

Mineral lands are expressly excluded from the grant to the Southern Pacific Railroad Company, and it has no right, therefore, to select mineral land as indemnity. *Southern Pac. R. Co. v. Allen G. M. Co.*, 13 L. D. 165 (1891).

The burden of proof is upon a railroad company to show the agricultural character of land that is returned as mineral by the surveyor-general. *Central Pac. R. Co.*, 13 L. D. 603 (1891).

The Northern Pacific Railroad Company is not entitled to notice from the General Land Office, with the view to appeal therefrom where mineral claims that embrace lands within the odd-numbered sections of the grant are approved for patent, and the record shows that the discovery and location of the mine is subsequent to the definite location of the road.

"While it may be true, as contended by counsel, that the Circuit Court for the Ninth Judicial Circuit has gone to the extent of holding that the right of the company attaches to mineral lands, unless there are known mines thereon at date of the definite location of the road, yet I am unwilling to accede to the contention that the Supreme Court of the United States has so decided." *Northern Pac. R. Co.*, 13 L. D. 691 (1891).

A mining claim in conflict with a prior grant to a railroad company for station purposes may pass to patent, subject, however, to the right of occupancy by the company as to the part in conflict.

"If the land in dispute is not 'needed' by the company for the specified purposes, then the mineral claimant can mine the soil and take therefrom the minerals which belong to him, without infringing upon the grant of the company. If the company does not actually use the land in dispute for station purposes, then it will be presumed not

to 'need' it, and so long as this non-user continues the mineral claimant can use it for any purpose he pleases, provided he does not thereby interfere with any present or prospective use that may be needed by the company. If the company should at any time abandon the occupancy of the land, or should its right of way be lost or destroyed, the title of the mineral claimant thereto would become free and unrestricted." *Eugene McCarthy*, 14 L. D. 105 (1892).

The settlement of an alien on coal land affords no claim thereto under the coal land acts of July 1, 1864, and March 3, 1865, as against the withdrawal of such land on general route under the grant of the Northern Pacific. Lands withdrawn for the benefit of said grant are not subject to settlement or purchase under the coal land law. *Northern Pac. R. Co. v. Collins*, 14 L. D. 484 (1892).

The discovery of the mineral character of land at any time prior to the issuance of patent therefor effectually excludes such land from the grant to the Northern Pacific Company. *Northern Pac. R. Co. v. Champion Con. M. Co.*, 14 L. D. 699 (1892).

Land is mineral within the exception from the grant to the Northern Pacific Railroad Company where the development and its results display such promise that the prudent, reasonable man would be justified in expending money and labor in legitimate mining operations, untainted by any appearance of speculation. *Casey v. Northern Pac. R. Co.*, 15 L. D. 489 (1892).

The location of a mine on land prior to the grant thereof to a railroad does not establish the fact of its mineral character so as to except it from the grant. The land having been returned as agricultural, to establish its mineral character it is necessary to show that it is capable of being profitably worked for minerals so as to make it more valuable for mining than for agriculture. *Berry v. Central Pac. R. Co.*, 15 L. D. 463 (1892).

The presumption as to the character of land created by the return of the surveyor-general does not preclude the assertion of any right, or the proof of the facts in the case as they really exist. All mineral lands are excepted from the grant to the railroad company, and until the issuance of patent the Department has jurisdiction to determine whether any of the land within the limits of the grant is mineral, and the exercise of such authority is an imperative duty of the Department. *Winscott v. Northern Pac. R. Co.*, 17 L. D. 274 (1893).

The admission made by the railroad company by its demurrer in *Barden v. Northern Pacific R. Co.*, did not bind the Department, which was still bound to inquire into the actual character of the land in question. *Barden v. Northern Pacific R. Co.*, 19 L. D. 188 (1894).

By the terms of the granting act all mineral lands were reserved and excluded from its operation. A patent was issued to the railroad company for certain described land, but excepting "all mineral lands, should any such be found to exist in the tracts embraced in the foregoing description." Held, that, under *Barden v. Northern Pacific R. Co.*, the Department is without authority to inquire into the character of the lands. *Courtright v. Wis. Cent. R. Co.*, 19 L. D. 410 (1894).

The exception of mineral lands from these grants by the act of

June 22, 1874, does not include lands containing phosphate deposits. The term "mineral" in this connection only includes the valuable metals, such as gold, silver, cinnabar, and copper. *Tucker v. Florida Ry. & Nav. Co.*, 19 L. D. 414 (1894).

An application should not be allowed when the land embraced therein is covered by a railroad selection of record without due notice to the company. *Southern Pac. R. Co. v. Griffin*, 20 L. D. 485 (1895).

IV. HOMESTEAD AND PRE-EMPTION GRANTS.

Mineral lands are not open to settlement and purchase under the Homestead and Pre-emption Acts. They are distinctly reserved from the operation of those acts.

Rev. Stats., sec. 2258. "The following classes of land, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit: . . . Fourth, lands on which are situated any known salines or mines."

Sec. 2341. "Wherever upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of these homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title relating to 'Homesteads.'"

No title, therefore, to known mineral lands can be acquired under the homestead or the pre-emption laws. If an agricultural patent should issue for such land it would be declared invalid by a court of equity. To bring them within the exception, however, lands must not only contain minerals, but they must, at the time the settler acquires the legal title, be more valuable for mining than for agricultural purposes, and be known to be so. That time is not the date of homestead entry, but the time of issuance of the final certificate. And it is not sufficient that they contain a large amount of mineral that might be profitably worked under different circumstances. They must, at the time of the final entry, be more valuable as mineral than as agricultural lands.

Though conditions may subsequently arise to reverse this relation of value, the title is not affected thereby. Worked out and abandoned mines may subsequently be entered as homesteads, though they still contain some ore, but not an amount to make their working profitable at the time. Though mere surface indications of minerals will not withdraw lands from entry as homesteads, if they are noted on public surveys and plats as mineral lands their character is sufficiently made known to so withdraw them.

As a patent for agricultural lands passes title to the centre of earth, the owner by junior title of a vein of mineral cannot follow it on its dip within the boundaries of the older grant.

These exceptions do not apply to mineral lands in Michigan, Wisconsin, Minnesota, Missouri, Kansas and Alabama, which are subject to disposal as agricultural lands.¹

United States. *Morton v. State of Nebraska*, 21 Wall. 660 (1874). Salines so encrusted with salt that they resemble "snow covered lakes" are "known" salines within the meaning of the provision of the pre-emption act of 1841 that such shall not be liable to entry.

Deffebach v. Hawke, 115, 392 (1885). No title from the United States to land known at the time of sale to be valuable for its mines of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws, or in any other way than as prescribed by the laws specially authorizing the sale of such land, except in the States of Michigan, Wisconsin, Minnesota, Missouri, and Kansas.

See this case on p. 515, *ante*.

United States v. Reed, 28 Fed. 482 (1886), C. C. D. Oregon. Notwithstanding there is some measure of gold deposited in a tract of land, it is subject to entry under the homestead law as agricultural land, if under the conditions as they exist, or may reasonably be expected or produced, it is more valuable for agriculture than mining.

"Nor can account be taken of profits that would or might result from mining under other and more favorable conditions and circumstances than those which actually exist, or may be produced or expected in the ordinary course of such a pursuit or adventure on the land in question," as that the gold therein might be profitably worked if an unlimited supply of water could be procured, the watershed in fact supplying but a small volume of water.

The land in question had been mined for twenty-five years for gold, and being considered to be worked out, was abandoned. It was then used for agricultural purposes, and was finally entered as a homestead. This entry was valid in the absence of any proof that it could be profitably mined.

¹ Rev. Stats. 2345; Act May 5, 1876, 1 Supp. to Rev. Stats. 104; Act March 3, 1883, 1 Supp. to Rev. Stats. 404.

The statutes only reserve lands on which are known mines from entry under the homestead law, and admitting that an applicant for an entry under said law may be required to swear that the land in question is not used or claimed for mining purposes, and that if the oath is false the affiant is guilty of perjury, yet his entry is not thereby vitiated.

Colorado Coal & Iron Co. v. United States, 123, 307 (1887). In order to constitute the exemption of coal lands contemplated by the pre-emption act under the head of "known mines," there must be ascertained coal deposits upon the land, of such an extent and value as to make it more valuable to be worked as a coal mine under the conditions existing at the time, than for merely agricultural purposes. The mere fact that there are surface indications of coal on public land will not of itself prevent the acquisition of title to the land under the pre-emption laws; nor will the fact alone, that after acquisition of such title the surface indications prove to be veins which can, by a change of circumstances, be profitably worked, invalidate such a title. The question must be determined according to the facts at the time of the sale.

The definition of "known mines" is the same as in railroad, school land, and town-site grants. "It will be seen that so far as the decisions of this court have heretofore gone, no lands have been held to be 'known mines,' unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine which had been worked or was capable of being worked." Matthews, J.

As to coal lands which are noted on public surveys and plats as such, it is not to be disputed that their character is thereby made known so as to withdraw them from entry.

Amador Medean G. M. Co. v. South Spring Hill G. M. Co., 36 Fed. 668 (1888), C. C. N. D. Cal. An owner under a patent of mineral lands, including a gold-bearing vein having its apex within the boundaries of the land patented, is not entitled to follow his vein downward on the dip, across his exterior boundaries into the land of an adjacent proprietor holding an elder title under a patent for agricultural lands. "By the entry and payment of Hammock, there being no mine on the land, the entire interest to the centre of the earth vested in him, and there was nothing left in the United States for the subsequent grant to other parties to operate upon."

United States v. Culver, 52 Fed. 81 (1892), C. C. W. D. Ark. If lands are valuable for minerals, and were purchased by defendants as agricultural land with a knowledge of that fact, the patent issued by the government will pass no title, and at the suit of the government will be declared void by a court of equity. The lands are reserved from such disposition by Rev. Stats. 2318. They are not excepted therefrom by the proclamation of the President throwing them open to purchase, for they had already by reason of their mineral character been appropriated for other purposes.

Kansas City M. & M. Co. v. Clay, 29 Pac. 9 (1892). In **Arizona**. ejectment where plaintiff relies on a patent issued on a pre-emption entry, defendant may give evidence to show that at the time of the entry there was upon the land a known vein of gold and silver

bearing quartz, and that the same had prior thereto been located and worked for its minerals. If these facts were true, the Land Department was without authority to issue the patent, and it was void.

"We conclude, therefore, that the exemption of 'known salines or mines' under the pre-emption law should be construed as preventing the obtaining, under the act, of any title to such mines as are known to exist at the date of application for patent, and hence as constituting one of the exceptions to the conclusiveness of a patent to the public domain mentioned by the court in *Smelting Co. v. Kemp*, for want of authority or power in the Land Department to pass by pre-emption patent the title of the government to such mines. The title remaining in the United States, it follows that, when such patent has issued, it may be collaterally attacked in an action at law by proof that such mines were known to exist at the time of issuance of patent, and its character as a conveyance of such mines be defeated."

Richard v. Wolfing, 32 Pac. 971 (1893). A. having located a mining claim, shortly afterwards a patent for the south half thereof was issued to S. as agricultural land. All the work done by A. upon the mine was done on this southern part, and he obtained from S. a conveyance of the latter's title thereto.

As against a third person seeking to relocate a part of the ground, A.'s location was valid.

LAND OFFICE DECISIONS.

Sulphur springs are not saline or mineral within the inhibition of the statutes excluding mineral and saline lands from pre-emption entry or scrip location. Rev. Stats. 2258. Copp, 75 (1869).

Minerals discovered upon lands already patented as agricultural lands pass to the grantee, and the Land Department is without jurisdiction over them. Copp, 121 (1873).

Where land has been returned as mineral, though no mineral has been found upon it, and its proximity to mines indicates that minerals may be found therein, an agricultural entry will be suspended to await developments. *Ewing v. Hartman*, Copp, 161 (1875).

Where land is of little value for agricultural purposes, but is essential to the proper development of certain mines, for running tunnels thereto, it will be withheld from sale as agricultural land and disposed of only under the mineral law. *H. W. R. Crouch*, Copp, 186 (1876).

Certain lands in Arkansas were surveyed in 1845, and plats showing them to be agricultural approved. They were entered as agricultural land April 19, 1878, and it was shortly brought to the notice of the Department that the land was mineral, and an investigation having been ordered its mineral character was established. The agricultural entry was thereupon cancelled. "If at the date of his entry they were 'valuable for minerals' they were 'reserved from sale,' and the action of the local officers in allowing the entry was of no effect because in violation of law." Copp, 264 (1879).

Where land is known to contain valuable deposits of coal, it cannot be entered under the pre-emption or homestead acts. Copp, 332 (1874).

To constitute the exemption contemplated by the pre-emption law, under the head of "known mines," there should be upon the land, at the time of sale, ascertained coal deposits of such extent and value as to make the land more valuable for the coal, under the conditions then existing, than for agricultural purposes. A change of condition occurring after sale whereby new discoveries are made, or by means whereof it may become profitable to work the land for its coal, cannot affect the title as it passed at the time of the sale. *Nicholas Abercrombie*, 6 L. D. 393 (1887).

A segregation survey at the expense of the agricultural claimant may be properly directed, where his claim includes land of a mineral character covered by a previous mineral location. *Darragh v. Holdman*, 11 L. D. 409 (1890).

In order to defeat a pre-emption entry on the ground of the mineral character of the land, it must be shown that the mineral was known to exist at the date of entry. *Harnish v. Wallace*, 13 L. D. 108 (1891).

Where a pre-emption entry is attacked on the ground that it covers mineral land, it is not a sufficient defence to show that the mineral character of the land was not known to the entryman at the date of the entry, if it appears that it was known to others at that time, and that the ore was then exposed in such a manner and to such an extent that a person of ordinary intelligence who had been upon the tract could not be ignorant of the existence of the mineral deposit. *Tinkham v. McCaffrey*, 13 L. D. 517 (1891).

The discovery of coal in paying quantities on land embraced within a homestead entry precludes the completion of such entry. Where land has been designated in the public surveys as "coal land," the non-mineral affidavit of a homestead entryman is offset by the affidavit of protest made by one claiming it as coal land, and the burden of proof is upon the former. *Dickinson v. Capen*, 14 L. D. 426 (1892).

The date of final entry is the time at which the character of land must be established in order to exclude it from a homestead entry.

Where a contest was made, and the local officers decided that the land was non-mineral, and no appeal having been taken, final entry was made, the same contestants may not set up in the Land Office that by subsequent operations they have proved that the land contains minerals in paying quantities. *Rea v. Stephenson*, 15 L. D. 37 (1892); *Arthur v. Earle*, 21 L. D. 92 (1895).

The submission of final homestead proof does not preclude a contest as to the character of the land based upon subsequent discovery of minerals, where final certificate has not issued, and the General Land Office has required new proof to be made. The date of issuance of the final receipt is the time of sale. *Spratt v. Edwards*, 15 L. D. 290 (1892).

A homestead entry is open to attack on the ground that the land embraced therein is mineral, at any time before certificate issues. *Jones v. Driver*, 15 L. D. 514 (1892).

A placer location made in accordance with law operates to exclude the land embraced therein from other appropriation, and a homestead entry irregularly allowed for such land does not impair the rights of the mineral claimant. *Piru Oil Co.*, 16 L. D. 117 (1893).

Land chiefly valuable for the building stone which it contains is not by such fact excluded from entry under the settlement laws. It does not follow from the act of Aug. 4, 1892, "that land chiefly valuable for building stone shall be considered as mineral land, or that such land may not also be entered under the homestead law, or that it might not have been entered under the pre-emption law prior to its repeal. It then becomes a question of priority of the claims." Prior to the act, there was no authority for a placer location of such land, and such a location will not defeat a subsequent pre-emption claim initiated prior to the passage of said act. *Clark v. Ervin*, 16 L. D. 122 (1893).

Land containing stone useful for building purposes is not thereby excluded from agricultural entry, though more valuable as a quarry than for agricultural purposes. *Hayden v. Jamison*, 16 L. D. 537 (1893).

Homestead entry made with knowledge that the land embraced therein contains valuable deposits of phosphate, is illegal, and must be cancelled. *Gary v. Todd*, 18 L. D. 58 (1894).

The failure of mineral claimants to comply with a departmental order, and show by survey the extent of an alleged conflict with an agricultural entry, warrants the conclusion that no such conflict exists. *Winters v. Bliss*, 19 L. D. 287 (1894).

V. INDIAN RESERVATIONS.

As only the unappropriated public domain is open to occupation and purchase under the mineral law, no location can be made upon land within an Indian reservation. Such a location is void, and does not become valid if the land is subsequently opened to settlement. Acts done prior thereto are of no effect as steps in the completion of the location. But a party in possession at the time of opening the land to settlement, with the requisite discovery and sufficient marks on the ground, may adopt and complete the location, and acquire a valid possessory title.

By a similar course of reasoning a patent for lands included in an Indian reservation is void.

United States. *United States v. Carpenter*, 111, 347 (1884). Location of land scrip upon and patent for land reserved for Indians under provisions of treaties with them are void.

Kendall v. San Juan S. M. Co., 144, 658 (1892), affirming s.c. 9 Colo. 349 (1886). Plaintiff located a mining claim on Sept. 3, 1872, on land within the Ute Indian reservation. The Indian title was extinguished in March, 1874, and defendants located the same lode on Aug. 29, 1874, plaintiff doing nothing until October, 1878, when he filed an additional certificate of location. He was held to have no title. No location could be initiated on this land until it was withdrawn from the reservation and became a part of the public domain. This case differs from *Noonan v. Caledonia Mining Co.*, 121 U. S. 393. In that case there was no new

location, by different parties, after the removal of the reservation, to interfere with the old location then renewed and with a proper record.

Besides the plaintiff had not, within the requisite time after the land became open to location, complied with the laws of Colorado as to the contents and record of the location certificate.

Collins v. Bubb, 73 Fed. 735 (1896), C. C. E. D. Wash. The act of July 1, 1892, opening a part of the Colville reservation, annulled the executive order creating the reservation as to said tract, and restored the same to the public domain, subject only to the rights of the Indians to make selections of lands to be allotted to them in severalty. Lands valuable for the minerals they contained were not subject to this selection, and citizens might go upon the tract, prospect for minerals, and locate mining claims without further authorization or permission by executive proclamation.

French v. Lancaster, 2, 346 (1880). No title to mining Dakota. ground could be acquired by acts of location and appropriation prior to Feb. 28, 1877, and while the great Sioux Indian reservation covered the ground in question. A stipulation by the parties to try the case without regard to the reservation, and upon the theory that such reservation did not affect the question between them, was of no effect and was disregarded. The treaty under which the reservation existed prohibits the settlement upon any land contained therein.

Golden Terra Mining Co. v. Smith, 2, 377 (1881); *French v. Lancaster* and *Uhlig v. Garrison* followed. Lawrence County was included in the Sioux Indian reservation, and before Feb. 28, 1877, no title to lands or mines therein could be acquired or transferred. The District Court having found as facts that the defendants, in an action to quiet title and for an injunction, were upon that day in exclusive possession of such mining grounds with the requisite vein therein, and that they thereafter performed every act necessary to constitute and maintain a valid location, the plaintiff could not recover any portion thereof by virtue of an attempted prior location made Feb. 28, 1877.

Caledonia G. M. Co. v. Noonan, 3, 189 (1882), affirmed in *Noonan v. Caledonia G. M. Co.*, 121 U. S. 393 (1887).

The right of possession to a quartz mining claim depends, after the discovery of a vein within the limits of a claim, upon the performance of certain acts of location, and continuing compliance with the laws of Congress, and with the local laws, rules and regulations not inconsistent with the laws of Congress.

Such acts performed while the inhibition of the treaty with the Indians remained in force were of no avail, but a party in possession on Feb. 28, 1877, with the requisite discovery, with the surface boundaries sufficiently marked, with the notice of location posted, and with a disclosed vein of ore, could, by manifesting his adoption of these facts and subsequently causing a proper record to be made, and performing the amount of labor or making the improvements necessary to hold the claim, date his right from that day; and such location and subsequent labor and improvements would give him the right to the possession from that day thereafter.

LAND OFFICE DECISIONS.

Minerals in Indian Territory are reserved by the United States. The Land Office has no control over them. Copp, 119 (1873).

Mineral lands cannot be entered with Sioux half-breed scrip under the act of July 17, 1854. *Nerce Valle*, Copp, 187 (1876).

Mining upon the Crow Indian reservation is illegal, and a claim lying within it, though mined for several years, cannot be surveyed and patented. Copp, 236 (1879).

Land legally reserved and withdrawn from sale, and set apart as an Indian reservation, may not be purchased as coal land. *John Campbell*, 6 L. D. 317 (1887).¹

¹ As to mineral lands in military reservations, see Attorney-General's opinion, 1 L. D. 552 (1881); the location of private land grants upon mineral lands, Copp, 181 (1875); *Baca Float*, 12 L. D. 676 (1891). A timber entry under the act of June 3, 1878, is not permissible, if the land contains mining improvements made and maintained by another in good faith. *Kneeland v. Norton*, 10 L. D. 271 (1890).

CHAPTER XVII.

SPECIAL STATUTORY PROVISIONS FOR THE SALE OF PUBLIC
LANDS CONTAINING PARTICULAR MINERALS.

I. Coal Lands.

| II. Saline Lands.

I. COAL LANDS.

THE laws and regulations by which the title to the general mineral lands of the United States may be acquired by private persons are not applicable to lands chiefly valuable for deposits of coal. A distinct system has been devised by which such lands may be purchased from the government and held by private persons and associations. This is provided by Rev. Stats. 2347-2352, and by the Rules and Regulations issued by the Commissioner of the General Land Office in accordance with the authority contained in Rev. Stats. 2351. These are contained in the circular of July 31, 1882, and being a clear and authoritative exposition of the system, are here inserted.

“ Under the authority conferred by said section 2351, the following rules and regulations are issued for carrying into effect the provisions of said law : —

“ 1. Sale of coal lands is provided for —

“ By ordinary *private entry* under section 2347.

“ By granting a *preference right* of purchase, based on priority of possession and improvement, under section 2348.

“ 2. The land entered under either section must be *by legal subdivisions*, as made by the regular United States survey. Entry is confined to surveyed lands ; to such as are vacant, not otherwise appropriated, reserved by competent authority, or containing valuable minerals other than coal.

“ 3. Individuals and associations may purchase. If an individual, he must be twenty-one years of age and a citizen of the United States, or have declared his intention to become such citizen.

" 4. If an association of persons, each person must be qualified as above.

" 5. A person is not disqualified by the ownership of any quantity of other land, nor by having removed from his own land in the same State or Territory.

" 6. Any individual may enter by legal subdivisions as aforesaid any area not exceeding 160 acres.

" 7. Any association may enter not to exceed 320 acres.

" 8. Any association of not less than four persons, duly qualified, who shall have expended not less than \$5,000 in working and improving any coal mine or mines, may enter under section 2348 not exceeding 640 acres, including such mining improvements.

" 9. One person can have the benefit of one entry or filing *only*. He is disqualified by having made such entry or filing alone or as a member of an association. No entry can be allowed an association which has in it a single person thus disqualified, as the law prohibits the entry or holding of more than one claim either by an individual or an association.

" 10. Lands that are sufficiently valuable for gold, silver, or copper, to prevent their entry as agricultural lands, cannot be entered as coal lands; and you will not allow any entry to be made under the above-named provisions of law of lands valuable for their deposits of said minerals.

" 11. The present rules relative to 'hearings to establish the character of lands,' contained in General Land Office regulations of Oct. 31, 1881, issued under the mining laws, will, as far as applicable, govern your action in determining the character of lands sought to be entered as coal land.

" 12. The price per acre is \$10 where the land is situated *more* than fifteen miles from any completed railroad, and \$20 per acre where the land is *within* fifteen miles of such road. The price of the land, however, must be determined by its distance from a completed railroad at the date of payment and entry irrespective of the preference right of entry.

" 13. When application is made to purchase coal land at the rate of \$10 per acre, you will in all cases require satisfactory proof that the land applied for is, at date of entry, situated more than fifteen miles from any completed railroad. This proof may consist of the affidavit of the applicant, or that of his duly authorized agent, corroborated by the affidavit of some

disinterested credible party showing personal knowledge of the facts.

"14. Where the land lies *partly within* fifteen miles of such road and in *part outside* such limit, the *maximum* price must be paid for all legal subdivisions, the greater part of which lie within fifteen miles of such road.

"15. The term 'completed railroad' is held to mean one which is actually constructed on the face of the earth ; and lands within fifteen miles of any point of a railroad so constructed will be held and disposed of at \$20 per acre.

"16. Any duly qualified person or association must be preferred as purchasers of those public lands on which they have opened and improved, or shall open and improve, any coal mine or mines, and which they shall have in actual possession.

"17. Possession by agent is recognized as the possession of the principal. The clearest proof on the point of agency must, however, be required in every case, and a clearly-defined possession must be established.

"18. The *opening and improving* of a coal mine, in order to confer a preference right of purchase, must not be considered as a mere matter of form ; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant.

"19. These lands are intended to be sold, where there are adverse claimants therefor, to the party who, by substantial improvements, actual possession, and a reasonable industry, shows an intention to continue his development of the mines in preference to those who would purchase for speculative purposes only. With this view, you will require such proof of compliance with the law, when lands are applied for under section 2348 by adverse claimants, as the circumstances of each case may justify.

"20. In conflicts, where improvements have been or shall hereafter be commenced, priority of possession and improvement shall govern the award when the law has been fully complied with by each party. A mere possession, however, without satisfactory improvements, will not secure the tract to the first occupant when a subsequent claimant shows his full compliance with the law.

"21. After an entry has been allowed to one party, you will make no investigation concerning it at the instance of any person

except on instructions from this office. You will, however, receive all affidavits concerning such case and forward the same to this office, accompanied by a statement of the facts as shown by your records.

"22. Prior to entry, it is competent for you to order an investigation, on sufficient grounds set forth under oath of a party in interest and substantiated by the affidavits of disinterested and credible witnesses.

Manner of obtaining Title.

"23. When title is sought by *private entry*, the party will himself make oath to the following application, which must be presented to the register:—

"I, ———, hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, to purchase the ——— quarter of section ———, in township ———, of range ———, in the district of lands subject to sale at the land office at ———, and containing ——— acres; and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States (or have declared my intention to become a citizen of the United States), and have never held nor purchased lands under said act, either as an individual or as a member of an association; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains large deposits of coal, and is chiefly valuable therefor; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

"24. Thereupon the register, if the tract is vacant, will so certify to the receiver, stating the price, and the applicant or his duly authorized agent must then pay the amount of purchase-money.

"25. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the General Land Office, from whence, when the proceedings are found regular, a patent or complete title will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, by the Commissioner at Washington or by the register at the district land office.

"26. This disposition at private entry will be subject to any valid prior adverse right which may have attached to the same land, and which is protected by section 2348.

"27. *Second.* When the application to purchase is based on a priority of possession, etc., as provided for in section 2348, the claimant must, when the township plat is on file in your office, file his declaratory statement for the tract claimed sixty days from and after the first day of his actual possession and improvement. Sixty days, exclusive of the first day of possession, etc., must be allowed.

"28. The declaratory statement must be substantially as follows, to wit:—

"I, ———, do solemnly swear that I am ——— years of age, and a citizen of the United States (or have declared my intention to become a citizen of the United States); that I never have, either as an individual or as a member of an association, held or purchased any coal lands under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States; and I do hereby declare my intention to purchase, under the provisions aforesaid, the ——— quarter of section ———, in township ———, of range ———, of lands subject to sale at the district land office at ———, and that I came into possession of said tract on the ——— day of ———, A. D. 18—, and have ever since remained in actual possession continuously; that I have located and opened a valuable mine of coal thereon; and have expended in labor and improvements on said mine the sum of ——— dollars, the labor and improvements being as follows: (here describe the nature and character of the improvements); and I do furthermore solemnly swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

—————

"29. When the township plat is not on file at date of claimant's first possession, the declaratory statement must be filed within sixty days from the filing of such plat in your office.

"30. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment; but you will allow no party to make final proof and payment except on notice to all others who appear on your records as claimants to the same tract.

"31. A party who otherwise complies with the law may enter *after* the expiration of said year, *provided* no valid adverse right shall have intervened. He postpones his entry beyond said year at his own risk, and the government cannot thereafter protect him against another who complies with the law, and the value of his improvements can have no weight in his favor.

"32. Each claimant at the time of actual purchase must make affidavit as follows:—

"I, ———, claiming under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, the right of purchase to the ——— quarter of section ———, in township ———, of range ———, subject to sale at ———, do solemnly swear that I have never had the right of purchase under the aforesaid provisions of law either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of ——— dollars, the nature of such improvements being as follows: ——— ———; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God. ——— ———.

"33. The application, declaratory statement, and the affidavit required at the time of actual purchase — the forms of which are given above under paragraphs 23, 28, and 32 — may be sworn to before any officer authorized by law to administer oaths, but the authority of such officer must be properly shown.

"34. Any party duly qualified under the law, *after* swearing to his application or declaratory statement, may, by a sufficient power of attorney duly executed under the laws of the State or Territory in which such party may then be residing, empower an agent to file with the register of the proper land office the application, declaratory statement, or affidavit required at the time of actual purchase, and also authorize him to make payment for and entry of the land in the name of such qualified party; and when such

power of attorney shall have been filed in your office you will permit such agent to act thereunder as above indicated.

" 35. Where a claimant shows by affidavit that he is not personally acquainted with the character of the land, his duly authorized agent who possesses such knowledge may make the required affidavit as to its character; but whether this affidavit is made by principal or agent, it must be corroborated by the affidavits of two disinterested and credible witnesses having knowledge of its character.

" 36. Nothing in these regulations shall be so construed as to prevent a party from proving his citizenship or age, or establishing the status of the lands sought to be entered, in accordance with ordinary rules of evidence; and any proof regularly introduced for that purpose that would be competent in a court or before a commissioner charged with the ascertainment of facts may be considered.

" 37. Assignments of the right to purchase will be recognized when properly executed. Proof and payment must be made, however, within the prescribed period, which dates from the first day of the possession of the assignor who initiated the claim.

" 38. The 'Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior,' approved Dec. 20, 1880, will, as far as applicable, govern all cases and proceedings arising under the sections of the Revised Statutes above quoted providing for the sale of coal lands of the United States.

" 39. You will report at the close of each month as 'sales of coal lands' all filings and entries in separate abstracts, commencing with number *one*, and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal lands, you will continue the same without change."

United States. *Colorado Coal & Iron Co. v. United States*, 123, 307 (1887). In order to exempt coal land from pre-emption there must be ascertained coal deposits upon the land, of such an extent and value as to make it more valuable to be worked as a coal mine under the conditions existing at the time than for merely agricultural purposes. If the land is noted on the public surveys and plats as coal land, it is thereby withdrawn from entry as agricultural.

United States v. Trinidad C. & C. Co., 137, 160 (1890), reversing s. c. 37 Fed. Rep. 180. Officers, stockholders, and employees of a

private corporation formed a scheme whereby they made entries of vacant coal lands of the United States in their individual names, but really for the benefit of the corporation. The scheme was carried out and patents were issued to such individuals, who immediately conveyed the legal title to the corporation, which bore all the expenses and cost of obtaining the lands, and some of the members of which had previously taken the benefit of the statute relating to the disposal of the public coal lands. *Held*, that such a transaction was in violation of Rev. Stats. 2347, 2348, and 2350, being a fraud upon the government, at whose suit the patents will be vacated; and that it is not necessary to the right of the United States to maintain a suit to cancel such patents, that the government should offer to refund the moneys paid by the patentees to the United States. If the corporation be entitled, upon cancellation, to have such moneys refunded, it must be assumed that Congress will make an appropriation for the purpose when it becomes necessary.

A private corporation is an association of persons within the meaning of the above sections.

Lipscomb v. Nichols, 6, 290 (1882). A contract by which one party agrees to furnish money to make payment for, and the other to do the work required upon, coal lands, is not in violation of the act of Congress relating to the entry and purchase of such lands.

The act relating to the entry and purchase of coal lands on the public domain is wholly unlike the laws governing entry and acquisition of title by occupants of agricultural lands.

Walsh v. Hastings, 20, 243 (1894). In an action by a broker for commissions for the sale of an interest in coal lands, it was set up as a defence that the transaction was illegal in that its purpose was to furnish defendants with money to procure title from the government. "The thing prohibited is the procurement of title for the benefit of others, and to deprive a broker of compensation where this element appears, it must be further shown that he was aware of the fact at the time, or had sufficient notice to put him upon inquiry."

Johnston v. Harrington, 31 Pac. 316 (1892). One who files a coal declaratory statement and enters into possession, becomes the owner of building stone which he may take from the land, and as against third persons it is immaterial whether it was obtained in an honest attempt to develop the coal claim or otherwise.

LAND OFFICE DECISIONS.

Parties owning coal mines have no right to follow their vein or coal bed under the land of another. *Copp*, 339 (1874).

Coal lands are included in the Union Pacific Railroad grant, and such lands may not be located under act of March 3, 1873. *Copp*, 338 (1873).

When a corporation applies for a patent for coal lands and files a declaratory statement, it is necessary for the secretary thereof to file his affidavit, setting forth the names of all the stockholders at the date of purchase, and for each stockholder to file an affidavit that he has

never held or purchased any coal lands under the act of March 3, 1873, either as an individual or as a member of an association. Copp, 338 (1873).

Coal lands are not mineral lands within the meaning of the reservation in the Oregon Location Act of 1850. Previous to July 1, 1864, lands containing coal were not held to be excluded from sale under the acts of Congress relating to the disposal of agricultural lands. Copp, 339 (1874).

Where a person has filed a declaratory statement, but has not followed it up by entry, and abandons and relinquishes the filing, he has not brought himself within the provisions of the statute confining him to one entry, but may file upon another tract. Copp, 343 (1877).

Coal lands are not subject to entry under the timber culture laws. Copp, 345 (1878).

The Coal Act contemplates any variety of coal, whether anthracite, bituminous, lignite, or cannel. Copp, 345 (1880).

If coal land was situated more than fifteen miles from a completed railroad at the time claimant commenced opening and improving the mine, and when he filed his declaratory statement, but was within fifteen miles of such road at the date of entry, the price charged should not be less than \$20 per acre. The price depends wholly upon the distance at the date of entry; that is, of proof and payment irrespective of the preferred right of entry. *Instructions*, 1 L. D. 540 (1881); *Joseph L. Colton*, 10 L. D. 422 (1890).

The qualification of members of a company purchasing coal lands is to be determined as of the date of entry. *Kerr v. Utah-Wyoming Imp. Co.*, 2 L. D. 727 (1883).

The price of coal land is determined by its distance from a completed railroad at date of entry, irrespective of the preference right of entry. The maximum price must be paid if the land is within fifteen miles of a completed railroad, although inaccessible, an impassable range of mountains lying between. The act of July 28, 1882, did not withdraw lands in the Ten Mile Strip in Colorado from the general rule regulating price.

Whatever rights might have been acquired by certain parties during the suspension from sale, of lands in the Ten Mile Strip, were lost by their failure to file declaratory statements within sixty days from July 28, 1882, as required by Rev. Stats. 2349. *Frank Foster*, 2 L. D. 730 (1883).

The declaratory statement, under Rev. Stats. 2348 and 2349, must be made by the applicant himself. No conflict or adverse filing appearing of record, the claimant is allowed to make his declaratory statement and affidavit *nunc pro tunc*. *J. W. Hallowell*, 2 L. D. 735 (1884).

Coal lands must be entered by legal subdivisions, and there is no authority for segregating the coal from the other land within a forty acre subdivision. The question to be determined is whether the forty acres, taken as a whole, are more valuable for the coal which they contain than for agricultural purposes. *Mitchell v. Brown*, 3 L. D. 65 (1884).

In case of an application to purchase under Rev. Stats. 2347, with-

out having filed a declaratory statement, no rights are acquired by virtue of alleged prior possession as against adverse claimants who had previously filed declaratory statements within the statutory period. *Lezeart v. Dunker*, 4 L. D. 96 (1885).

It is not sufficient "that the weight of the testimony as to the dip, strike, and angle of inclination of the surrounding veins, mines, and croppings, together with the invariable similarity of the increasing strata to that discovered by the shaft, established that the coal deposit extended under the lands in question." Entries upon such land, upon which coal had not been discovered, were cancelled. *Kings County v. Alexander*, 5 L. D. 126 (1886).

Land legally reserved and withdrawn from sale, and set apart as an Indian reservation, may not be purchased as coal land. *John Campbell*, 6 L. D. 317 (1887).

Coal entries made by persons for the benefit of others who furnished the money to pay therefor, under an agreement that the title should be conveyed to them as soon as acquired, are invalid and will not be confirmed. The fact that the entries were made with the knowledge of certain officials in the General Land Office will not estop the Department from passing on the legality of the entries when brought before it for action. *Adolph Peterson*, 6 L. D. 371 (1887); *Northern Pac. Coal Co.*, 7 L. D. 422 (1888).

Proof of citizenship, in coal land entries, is sufficient if made in due conformity with the regulations prescribed for carrying into effect the law providing for the sale of coal land, compliance with the additional requirements of the mining regulations not being requisite thereto.

The coal land circular of July 31, 1882, does not require that it be shown when and where the respective applicants were born, and their present place of residence. *William H. Mosley*, 6 L. D. 620 (1888).

Several legal subdivisions, comprising a coal entry under Rev. Stats. 2347, must be contiguous. *C. P. Masterson*, 7 L. D. 172 (1888); *Kendall v. Hall*, 12 L. D. 419 (1891).

The failure of the entryman to apply for leave to file a second declaratory statement, being satisfactorily explained, and it appearing that such filing would have been authorized and that no adverse claims exist, it is accordingly authorized *nunc pro tunc*, and the entry based thereon confirmed. The statute provides that only one entry shall be made by the same person; but this prohibition does not relate to the filing of the declaratory statement provided for, as is the case in the pre-emption laws. *John McMillan*, 7 L. D. 181 (1888).

A coal land entry embracing non-contiguous tracts, made in good faith and in accordance with the practice then existing, may be passed to patent as made, or so amended as to include contiguous tracts. *C. P. Masterson*, 7 L. D. 577 (1888).

A coal entry, illegal because made for the benefit of another, and because coal had not been discovered on the land, will not be cancelled upon the application of a transferee at whose instigation the entry was made, and who was not prompt to act when he discovered that the land contained no coal. Such entry may pass to patent for his benefit in consideration of the price paid for the land and the fact that repayment cannot be allowed. No right of repayment exists in favor of an

entryman who has procured the allowance of an entry through false testimony, and a transferee under such an entry can have no better right. *Gerard B. Allen*, 8 L. D. 140 (1889).

A cash entry of coal land may be amended after the patent, under Rev. Stats. 2369 and 2370, where the entrymen exercised reasonable diligence in obtaining the proper description of the land, and the mistake was caused by the indistinct character and partial obliteration of the marks at the section corners. In such a case, however, the entryman will be required to reconvey the land improperly patented and furnish satisfactory evidence of the non-alienation thereof. *Richard Gill*, 8 L. D. 303 (1889).

Where one claiming coal land makes a contract of agency with another, by which the latter "should continuously hold possession for me until such time as I could settle with the government for the land," and "when the land came into the market he would pay me so much for my interest there, if he chose to, and enter it himself; otherwise this agreement was null and void;" and the agent put a force of men on the claim who worked thereon to develop the mines, the claimant had no such *actual* possession as would entitle him to a preference right of entry under Rev. Stats. 2348. The land might be entered as vacant under Rev. Stats. 2347. *McDaniel v. Bell*, 9 L. D. 15 (1889).

Failure to file a coal declaratory statement within sixty days after date of actual possession, and to make payment for the land within one year from the expiration of the time allowed for such filing, renders the land subject to the entry of another who has complied with the law. *Brennan v. Hume*, 10 L. D. 160 (1889).

The right of purchase under a coal declaratory statement is not forfeited, in the absence of a valid adverse right, by failure to make proof and payment within the statutory period. An applicant for the right of purchase who has failed to make proof and payment within that period, cannot secure further protection by a second filing for the same tract. He should be required to comply with the law, and upon failure to do so, after due notice, his filing should be cancelled. An uncanceled filing of record for the same tract is a sufficient ground of objection to the second application. *Alfred Grunsfield*, 10 L. D. 508 (1890).

A second coal declaratory statement cannot be filed in the absence of a valid reason for abandoning the first. *Albert Eisemann*, 10 L. D. 539 (1890); *Conner v. Terry*, 15 L. D. 310 (1892).

A declaratory statement offered during the pendency of a previous application to file, made for the benefit of the same applicant, though in the name of another, confers no right as against an intervening adverse claim.

An applicant for the preference right to purchase under Rev. Stats. 2348 must be in actual possession of the land when he applies for such right, and the labor expended and the improvements made must be such as to clearly indicate his good faith. *James D. Negus*, 11 L. D. 32 (1890).

When one files a declaratory statement, and after a year relinquishes it, giving no other reason except that he is unable to pay for the land, he will not be allowed to file another declaratory statement for another tract. *Walter Dearden*, 11 L. D. 351 (1890).

A declaratory statement should not be received while the land is covered by the existing homestead entry of another. Priority of possession and improvement of coal land, followed by proper filing and development of the mine in good faith, entitle the claimant to the preference right of purchase under the statute. *Bullard v. Flanagan*, 11 L. D. 515 (1890).

The price of coal land is to be determined by its distance from a completed railroad at the date of entry. The application of this rule is not affected by the fact that entry had been delayed by the filing of a protest. *Edward B. Largent*, 13 L. D. 397 (1891).

In determining whether an applicant for the preference right to purchase has manifested "continued good faith," the degree and condition in life of the applicant may be properly taken into consideration. *Watkins v. Garner*, 13 L. D. 414 (1891).

The Northern Pacific Railroad grant withdraws lands covered by it from settlement or purchase under the coal land law. *Northern Pac. R. Co. v. Collins*, 14 L. D. 484 (1892).

An application to purchase cannot be allowed where it appears to be made in the interest of another who has already exhausted his rights under the law authorizing the sale of such land. *McGillicuddy v. Tompkins*, 14 L. D. 633 (1892).

Repayment of purchase-money paid for coal land is not authorized where the entry is cancelled on account of its fraudulent character. *D. A. & G. W. Mulvane*, 15 L. D. 146 (1892).

A declaratory statement will be rejected if it is shown that the entryman filed it in the interest of others. *Conner v. Terry*, 15 L. D. 310 (1892). *E. R. Stafford*, 21 L. D. 300 (1895).

In a contest between an applicant to purchase land as timber land, and one who claims the land as coal land, the burden of proof is on the former.

In determining whether land is subject to entry under the coal land law, the means of transportation cannot be taken into consideration as affecting the value of the coal. Those means cannot affect the intrinsic value of the coal. *Smith v. Buckley*, 15 L. D. 321 (1892).

A transferee claiming under a coal entry has no better title than the entryman himself would have, and the right acquired by the transfer is subject to the subsequent action of the Department.

Coal land is entered by legal subdivisions, and where the tract entered consists of several such, if it is shown that any of these is not in fact coal land, the entry will be cancelled as to that subdivision. *Scott v. Sheldon*, 15 L. D. 588 (1892).

A. and B. filed declaratory statements for adjoining tracts of forty acres each. A.'s tract being necessary to the development of B.'s, A. sold his preference right to B., who made entry for the eighty acres. This was not two filings by B. Good faith being evident, the entry was treated as a change of the claim in the nature of an amendment. *Charles H. Ackert*, 17 L. D. 268 (1893).

No vested rights are secured by filing a coal declaratory statement, and a sale of the land thereafter by the claimant, prior to final proof and entry, defeats his right to purchase, and such entry made in his name will be cancelled. *Union Coal Co.*, 17 L. D. 351 (1893).

An application by an agent of an association to file a declaratory statement must comply with Rule 34 of the L. O. Regulations, and show what improvements have been made and the qualifications of the persons composing the association. *Johnson v. South Dakota*, 17 L. D. 411 (1893).

An entry allowed in accordance with existing regulations which did not require proof as to the location of the land with respect to completed railroads, will not be cancelled for want of such proof.

The sale of a coal land claim after the actual execution of the final proof but prior to its filing and the payment of the purchase-money, does not necessarily warrant the conclusion that the entry was made for the use and benefit of another. That is a question of fact to be determined from evidence. *Durango L. & C. Co.*, 18 L. D. 382 (1894).

There being no statutory prohibition against the transfer of a preference right of entry, such a right may be assigned. An applicant for coal land is not disqualified by his having previously been the owner of a preference right to enter other coal lands, which he assigned to another person. *William H. McConnell*, 18 L. D. 414 (1894).

A coal entry allowed on defective declaratory statement and irregular proof will not be cancelled, in the absence of any adverse claim, where a proper declaratory statement is subsequently filed and the requisite additional proof is furnished. *Anthracite Mesa Coal Co.*, 19 L. D. 18 (1894).

When land is alleged to contain coal, it must be shown that it does so as a present fact, from actual production. It is not necessary, however, that there should be actual development on each forty acre subdivision where a vein had been discovered on one such subdivision and had been driven in a straight line for thirty-five feet toward another, and increased in thickness and improved in quality as it was extended; both subdivisions were held to be coal lands. *Hamilton v. Anderson*, 19 L. D. 168 (1894); *McWilliams v. Green River C. A.*, 23 L. D. 127 (1896).

One who filed a declaratory statement alleging possession from March 26, 1891, must make final entry before midnight of May 25, 1892. An offer to do so on May 26 is too late. *O'Gorman v. Mayfield*, 19 L. D. 522 (1894).

B. filed a declaratory statement on Feb. 20, 1893, claiming possession from February 15. It was shown that B. was connected as partner or stockholder with companies which had been mining coal on the land for ten years. He was held not to have such a *bona fide* possession as entitled him to question the right of one who claimed under a subsequent declaratory statement. Beside which the actual beginning of his possession was long anterior to the date claimed by him, and consequently his offer of final entry came too late. *Broad v. Ray*, 20 L. D. 422 (1895).

A declaratory statement cannot be filed on unsurveyed land. *Charles Lyon*, 20 L. D. 556 (1895).

As between two claimants, both claiming the land in good faith, priority in application should govern the award. *Paire v. Markham*, 21 L. D. 197 (1895).

One who purchases the possessory right to a developed vein while

the title is still in the United States, and thereafter remains in actual possession thereof, is entitled to file a declaratory statement and perfect title thereunder. D. filed declaratory statement in May, 1893, and remained in possession and developed the land and then sold to M., who remained in possession and filed his relinquishment and her own declaratory statement on May 1, 1895. Her right prevailed over that of a trespasser who filed a prior declaratory statement. *Swain v. Kearney*, 22 L. D. 806 (1896).

The statute does not require that a coal claimant must have opened a mine on the land at the time of filing a declaratory statement. *Ouimette v. O'Connor*, 22 L. D. 538 (1896).

The proviso to Rev. Stats. 2348 means "that where an association has expended \$5,000 or more in working and improving a coal mine or mines, then, in consideration of such expenditure, the association may enter by legal subdivisions not exceeding 640 acres of land, including the legal subdivisions of the land on which the mining improvements are actually situated, irrespective of whether the land covered by the improvements is coal land or agricultural land." *McWilliam v. Green River C. A.*, 23 L. D. 127 (1896).

On the failure of a claimant to perfect title within the statutory period, the work done by him inures to the benefit of a valid adverse claim then asserted for the land involved. *Ouimette v. O'Connor*, 23 L. D. 243 (1896).

ALABAMA COAL AND IRON LANDS.

By act of Congress of March 3, 1883 (22 Stat. 487, 1 Supp. Rev. Stats. 404), it was enacted that all public lands in Alabama, whether mineral or otherwise, should be subject to disposal only as agricultural land, with the proviso "that all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale," and with the further proviso that any *bona fide* entry previously made under the provisions of the homestead law might be patented without reference to the mineral land law, "in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto." This act was not repealed by the act of Aug. 4, 1892, which extended the provisions of the Stone and Timber Act to all the public land States. *James Bean*, 19 L. D. 389 (1894).

The act of March 3, 1883, relating to Alabama mining lands refers to vacant land, *i. e.* land that appears vacant on the records. One who had made a settlement on coal land in Alabama in 1871 is not entitled to enter the same as a homestead on the ground that the act of 1883 protected the inchoate right which he had under the act of May 14, 1880. *James A. Jones*, 2 L. D. 35 (1883).

Land in Alabama reported in 1879 as containing valuable coal, entered under the homestead law in January, 1883, which entry was voluntarily relinquished and cancelled in March 27, 1883, is within the proviso of the act of March 3, 1883. *Thomas J. Jackson*, 2 L. D. 36 (1883); *Mary E. Jeffray*, 4 L. D. 367 (1886).

The act of March 3, 1883, provides for the future disposition of

public lands. Entries or applications, with satisfactory proof and tender of purchase-money, previously made, were valid appropriations of the lands which they covered, unless impeached for fraud.

The exception from pre-emption is confined to known mines. The suggestion that possibly mines of coal may be found to exist upon land claimed by a pre-emptor is without force if such mines are not known. *Nancy Ann Caste*, 3 L. D. 169 (1884).

The act of March 3, 1883, operated only on lands withdrawn and designated as mineral, because more valuable for mining than for other purposes. *Cornelius Cadle, Jr.*, 3 L. D. 173 (1883).

A mineral location under which all requirements of the law have been met prior to the passage of the act of March 3, 1883, confers a vested right, which is not impaired by the provisions thereof. *Cordell Placer Mine*, 4 L. D. 476 (1886).

The act of March 2, 1819, by the first section of which section 16 in every township was granted to Alabama for school purposes, contains no reservation of mineral lands, and no subsequent statute has altered the effect thereof. The act of March 3, 1883, did not prevent the selection by the State as indemnity of lands reported valuable for coal before the passage of the act. *State of Alabama*, 6 L. D. 493 (1888).

Land returned as valuable for coal prior to the passage of the act of March 3, 1883, is not subject to homestead entry until after public offering. *Alice Jordan*, 7 L. D. 461 (1888).

Land offered after it was returned as valuable for coal, and prior to the passage of the act of March 3, 1883, is not subject to entry if it has not been offered at public sale since the passage of said act.

The fact that this land had been once offered at public sale, after the same was reported as valuable for its coal, but before the passage of said act, cannot, therefore, affect the question here involved. *Julius P. Knabe*, 8 L. D. 74 (1889).

Lands not known to be mineral, covered by *bona fide* settlement and filing made prior to the act of March 3, 1883, and in accordance with existing regulations, are not required to be offered under said act before the allowance of pre-emption entry therefor. *Thomas M. Knight*, 8 L. D. 297 (1889).

A homestead entry on mineral land initiated by settlement prior to the passage of the act of March 3, 1883, though not protected by an entry of record at that date, is within the intent of the last proviso of said act, and may be passed to patent thereunder.

"The departmental decision in the case of *James A. Jones* (3 L. D. 176), in so far as it holds that the last proviso of the act of 1883 only embraces entries of record made prior thereto, is hereby overruled." *E. S. Newman*, 8 L. D. 448 (1889).

An entry of land reported valuable for coal prior to the passage of the act of March 3, 1883, is not permissible until after public offering thereof. An application to purchase land in such a condition may be received and held suspended, pending an offering of the land at public sale, when, if the land is not sold, the application may be considered as of the date originally made. *Nathaniel Banks*, 8 L. D. 532 (1889). See s. c. 7 L. D. 512.

Land returned as valuable for coal prior to the act of March 3, 1883, is not subject to purchase under the act of June 15, 1880, until after public offering, though the original entry was made prior to the passage of the former act. A cash entry allowed under the act of 1880 of land previously reported as valuable for coal should be suspended until after public offering, and treated as an application to enter in the event that the land is not sold at such offering. The protection given by the act of 1883 to a *bona fide* entry, previously made, does not extend beyond the relinquishment of such entry. If the entryman so elects, the entry may be cancelled, with the right to repayment, and without prejudice to his right to make homestead entry elsewhere. *J. D. Maske*, 9 L. D. 203 (1889); *John C. Henley*, 9 L. D. 178 (1889); *Lorenzo D. Evins*, 9 L. D. 635 (1889).

An *ex parte* showing as to the character of the land is not sufficient to overcome the correctness of the mineral list in which the land is described as "valuable for coal." *Lorenzo D. Evins*, 9 L. D. 635 (1889).

An entry of land reported valuable for coal prior to March 3, 1883, and not subsequently offered, is an entry "erroneously allowed" for which repayment may be accorded in the absence of bad faith on the part of the entryman. *Michael Shannon*, 9 L. D. 643 (1889).

The right of a successful contestant cannot be exercised upon lands reported valuable for coal prior to March 3, 1883, and not thereafter offered at public sale. In such a case the application to enter may be suspended pending public offering, and if the land is not sold, said application may be considered as of the date when first presented. *Wade McFerrin*, 10 L. D. 140 (1890).

The report of a special agent, made prior to March 3, 1883, that land is valuable for coal, excludes such land from subsequent entry under the homestead law until after public offering. Land thus reported, but covered by a homestead entry at the passage of the act, becomes subject thereto on the cancellation of such entry. *Willie W. Thornton*, 11 L. D. 547 (1890).

The act of March 3, 1883, under departmental construction, is held applicable only to lands reported as "valuable" for coal or iron.

In the circular of April 9, 1883 (1 L. D. 655), the local officers were directed not to allow entries of tracts that had been investigated and reported as valuable for minerals. The tract in controversy was within the limits of the belt of lands so reported, but upon investigation it was classed as "coal not valuable," and hence was subject to entry under the terms of the circular, although it was reported as containing coal. *Avery v. Smith*, 12 L. D. 550 (1891); *James W. Burnum*, 14 L. D. 292 (1892).

A settlement on Alabama land prior to the date when such land is reported as valuable for coal, and the entry thereof subsequent to such report and prior to March 3, 1883, both made when the settler was disqualified to enter, will not operate to except such land from the reservation provided in the act. *Justice v. Alabama*, 12 L. D. 635 (1891).

By the terms of the act of March 3, 1883, the lands in Alabama theretofore reported as valuable for coal or iron must be offered at

public sale before agricultural entry is permissible. This requirement must be followed without regard to whether lands are properly or improperly so reported. *George H. Sherer*, 15 L. D. 563 (1892); *John B. L. Bonner*, 28 L. D. 251 (1896).

II. SALINE LANDS.

The disposal of these lands is regulated by act of Jan. 12, 1877, 19 Stat. 221, 1 Supp. to Rev. Stats. 127. Previous to the passage of this act the Land Department held that saline lands might be located as placers. Now, however, the subject is exclusively governed by the above act, so far as the States to which it applies are concerned, unless it is repealed by the act of March 3, 1891, ch. 561, sec. 9, 1 Supp. to Rev. Stats. 948, which provides that no public lands shall be sold at public sale, except mineral and other lands whose sale at public auction has been authorized by acts of Congress of a special nature having local application.¹

The circular of the Land Office issued Feb. 6, 1892, has the following on the subject of the act of 1877, at p. 60: —

“Congress passed an act January 12, 1877 (19 Stat. 221), for the sale of saline or salt-spring lands in certain States. This act has exclusive reference to that class of lands which at an early period were segregated from the public lands on account of salt springs, and reserved from disposal under general laws, and which, therefore, to use the language of the statute, were ‘incapable of being purchased under any of the laws of the United States relative to the public domain.’ See decision of the Supreme Court of the United States in the case of *Morton v. Nebraska* (21 Wallace, 660). These lands never were subject to the operation of the homestead and pre-emption laws, nor of any other law for the disposal of the public lands except the act of January 12, 1877, above referred to. That act provides for the disposal of such lands in a certain contingency at private sale, and, being special in character and of particular application, is not repealed or modified by the general provisions of the act of March 2, 1889, ‘to withdraw certain public lands from private entry’ (25 Stat. 854; second paragraph, circular of March 8, 1889, 8 L. D. 314).

“*Determination of the Character of the Lands.* — Should *prima facie* evidence that certain tracts are saline in character be filed with the register and receiver of the proper land district, they

¹ There is another exception, unimportant here.

will designate a time for a hearing at their office and give notice to all parties in interest, in order that they may have ample opportunity to be present with their witnesses. Such witnesses will be examined in regard to the saline character of the given tracts, and whether the same are claimed by any person; if so, the names of the claimants and the extent of their improvements must be shown.

“The witnesses should be thoroughly examined as to the true character of the land in other respects: its agricultural capacities; what kind of crops, if any, have been raised thereon, or can be raised from land of such character; whether it contains any valuable deposit of mineral of any kind, or of coal. In short, the testimony should be as complete as possible; and in addition to the points indicated above, everything of importance bearing upon the character of the land should be elicited at the hearing.

“The testimony taken at the hearing will be transmitted to the General Land Office by the register and receiver, with their opinion thereon. When the case comes before the General Land Office, such a decision will be rendered in regard to the character of the land as the facts may warrant.

“*Disposal of Saline Lands.*—Should the tracts be adjudged saline lands, the register and receiver will be instructed to offer the same for sale, after public notice, at the local land office of the district in which the same shall be situated, and to sell said tract or tracts to the highest bidder for cash, at a price not less than \$1.25 per acre.

“In case said lands should not be sold when so offered, they will be subject to private sale for cash, at a price not less than \$1.25 per acre, in the same manner as other public lands are sold at private sale.

“Should the tract in question be adjudged agricultural or mineral, it will be subject to disposal as such.

“The provisions of this act do not apply to any lands within the Territories, nor to any within the States of Mississippi, Louisiana, Florida, California, or Nevada, none of which have had a grant of salines by act of Congress. Nor do they apply to the States of Idaho, North Dakota, South Dakota, Montana, Washington, or Wyoming, none of which has had an express grant of saline lands, although each has had a grant declared to be in lieu of saline and other special grants.”

LAND OFFICE DECISIONS.

The policy of the government has been uniform since the inauguration of the public land system to reserve from sale salt springs and the adjacent lands. Grants of salt springs were made to the States and Territories as follows: Ohio, 1804, Stat. 2, 277; Indiana, 1804, Stat. 2, 277; Illinois, 1818, Stat. 3, 429; Missouri, 1820, Stat. 3, 545; Arkansas, Stat. 5, 58; Michigan, Stat. 5, 59; Florida, Stat. 5, 789; Iowa, Stat. 5, 789; Wisconsin, Stat. 9, 58; Minnesota, Stat. 11, 166; Oregon, Stat. 11, 383; Kansas, Stat. 11, 269; Nebraska, Stat. 13, 47. By the Colorado Enabling Act, March 3, 1875, salt springs not exceeding twelve, with six sections adjoining each, were granted to the State, "Provided that no salt springs or lands, the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State." This proviso applies only to private claims recognized by treaty stipulations. *Morton v. Nebraska*, 21 Wall. 660.

Applications for lands containing salt springs were accordingly rejected. *Hall v. Litchfield*, Copp, 333 (1876).

Salt is a mineral, and lands containing valuable deposits of salt are excepted from the grant to the Central Pacific Railroad Company.

The act of Jan. 12, 1877, providing for the sale of saline lands, is not applicable to lands in the State of Nevada. *Eagle Salt Works*, Copp, 336 (1877).

Many springs and many waters are impregnated with minerals held in solution; but it does not follow that the lands bearing such waters are mineral lands, and can be patented as such. Lands of a saline character are an exception, and are expressly provided for in the laws relating to the disposition of the public lands. Lands containing mineral springs not of a saline character are subject to sale under the general laws, and not under the acts relating to the sale of mineral lands. *Pagosa Springs*, 1 L. D. 562 (1882).¹

Land chiefly valuable for its salt deposits is not subject to entry as a placer mine. No authority exists for the disposal of saline lands or salt springs belonging to the United States, except under the provisions of the act of Jan. 12, 1877. The provisions of said act are not applicable to the Territory of Utah: hence there is no authority for the disposal of such lands in said Territory. *Salt Bluff Placer*, 7 L. D. 549 (1888).

The provisions in the act of March 3, 1875, requiring the State of Colorado to make its selection of salt springs within two years after the admission of the State, is directory only, and failure to select within the period specified does not work a forfeiture of the grant.

The act of 1875 is not repealed by that of Jan. 12, 1877, nor does the proviso in the later act amount to a legislative declaration that the right of selection conferred by the act of 1875 expires at the end of two years after the admission of the State. *State of Colorado*, 10 L. D. 222 (1890).

¹ See similar conclusion as to sulphur springs in *Morrill v. Margaret M. Co.*, 11 L. D. 563 (1890).

The settled policy of the government in the disposition of salt lands and salines has been, and is now, to reserve the same from general disposal. Deposits of rock salt are "salines," and not subject to entry under the statutes authorizing the acquisition of title to mineral lands. *Southwestern M. Co.*, 14 L. D. 597 (1892).

A desert land entry will not be allowed of land on the beach of Great Salt Lake chiefly valuable for the saline deposits therein and not susceptible of reclamation at a cost that would justify the outlay at any probable price for agricultural land. *Jeremy v. Thompson*, 20 L. D. 299 (1895).

On salt springs and salt lands in Alabama, see *State of Alabama*, 21 L. D. 320 (1896).

CHAPTER XVIII.

TITLE ACQUIRED BY STATUTE OF LIMITATIONS.

PROPERTY in minerals in place being real estate, title thereto may be acquired under Statutes of Limitations in the same way as title to other real estate. The same is true of title to mining claims upon the public domain. By Rev. Stats. 2332 it is provided that those who have held and worked their claims for the time prescribed by the Statutes of Limitations for mining claims of the State or Territory where they are situated, have a title sufficient to establish the right to a patent in the absence of any adverse claim. And such a possession, at least against a wrongdoer, raises a conclusive presumption that the claimant holds under a valid location.

In some States and Territories special limitations have been imposed by statutes upon suits for recovery of mining property,¹ but in the absence of such limitations such suits are governed by the general statutes relating to actions for the recovery of real estate.

The important question in these cases is what constitutes adverse possession of mining property.

Where the ownership of minerals in place is severed from the ownership of the soil or surface, the mere possession of the latter is not such a possession of the minerals beneath as to be adverse. Nor will the non-user of the minerals or of the right to dig them by the mine owner, convert the possession of the surface owner into an adverse possession of the minerals. The latter must perform some act adverse, hostile to the rights of the mine owner, which prevents him from exercising his rights. The surface owner setting up the statute must establish a possession

¹ Arizona, Rev. Stats. 1887, sec. 2308; Ann. Laws 1892, sec. 2178; West Vir. Colorado, M. A. S. 2923-6; Montana, Code Min. 1891, p. 1045. Civ. Proc. 1895, sec. 494; Oregon, Hill's

of the mine as such independently of his possession of the surface.

Such a possession must be actual, notorious, exclusive, continuous, peaceable, and hostile for the statutory period. And in these respects the surface owner is in no better position than a stranger. No act or acts on his part will establish title in him which would not give title to a stranger. Actual possession is taken by the opening of mines and carrying on of mining operations. That possession is continuous if the operations are continuous, or are carried on continuously at such seasons as the nature of the business and the customs of the country permit or require. A cessation of operations in accordance with the custom of the neighborhood, or from necessity occasioned by some natural agency, would not be an interruption of the possession. But there must be something evidencing possession in the interval which connects the operations when resumed with those which have gone before, and to distinguish such possession from a series of repeated acts of trespass.

Where there is no division of the estate in the surface from that in the minerals, the ordinary rules on the subject of the adverse possession of real estate govern.

To establish an adverse possession of a mining claim in the public domain, there must be actual possession of a part, accompanied by a claim of title to the whole, and continuous working thereon. Possession of the surface of the claim is possession of all the veins and ledges to which the owner of the claim has title. And conversely, without possession of the surface of a claim no possession of any of the veins whose apices are therein, can be adversely acquired, as by sinking shafts to them outside of the surface boundaries. The statute in such a case could only begin to run after the prior locator acquired actual knowledge of the fact of the possession of the vein. Where one party claims under a patent from the United States, the statute begins to run from the date of that patent. In Nevada adverse possession of a mining claim is defined by statute¹ to "consist in holding and working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof."

Of course the Statute of Limitations does not run against the United States.

¹ Gen. Stats. 1885, 3632.

United States. *Union M. Co. v. Taylor*, 100, 37 (1879). Where the plaintiff in ejectment was a tenant in common with the defendants, their possession of the claim was his possession, and the Statute of Limitations did not run against him until he was ousted by them and they maintained a possession adverse to him.

Hamilton v. Southern Nev. G. & S. M. Co., 33 Fed. 562 (1887), C. C. D. Nev. "The only evidence of actual possession for the prescribed time was going upon the land once and looking at its boundaries, and afterwards doing the annual hundred dollars' worth of work in tunnels, where those doing it were unseen during that time, for the purpose of not forfeiting complainant's rights and rendering the claim not liable to relocation. While defendant also claims and introduces testimony showing, or at least tending to show, that it also did the annual work required by the statute to preserve its rights during the same period for the same purpose, and so was itself in possession; that its possession was better than, or at least as good as, that of complainant. Evidently such a loose, uncertain, scrambling, and mixed possession is not sufficient to vest a title under the Statute of Limitations."

Hunt v. Patchin, 35 Fed. 816 (1888), C. C. D. Nev. The owners in common of a mining claim by agreement forfeited the claim by failing to do annual work, and one of them relocated it in his own name. In an action by the other to enforce a trust in his favor, begun May 18, 1885, he was not barred by the Nevada statute limiting to two years the time for commencing an action to recover a mining claim, when he had no intimation that the defendant denied the trust until May 29, 1883.

Glacier Mt. S. M. Co. v. Willis, 127, 471 (1888). A complaint in ejectment for a mine in Colorado, which alleges a valid and legal location by those under whom the plaintiff claims, and possession and occupation by the plaintiff for more than five consecutive years prior to the ouster, and payment of taxes by him during that time, sets up a sufficient claim to title as against everybody except the United States.

Francœur v. Newhouse, 43 Fed. 236 (1890), C. C. N. D. Cal. The taking actual possession of a portion of a claim, working and expending money thereon continuously and claiming title to the full limits, is adverse possession of the whole within the Statute of Limitations.

The title of the United States does not prevent the running of the statute as against other claimants.

California. *Fremont v. Seals*, 18, 433 (1861). The act of March, 1856, "for the protection of actual settlers and to quiet land titles in this State," was passed for the benefit of those who desire to build up homes and for that purpose are seeking in good faith lands for settlement and occupation. The eleventh section does not apply to miners engaged simply in extracting gold from a quartz vein. They are not settled upon their vein in the sense of the act.

Nessler v. Bigelow, 60, 98 (1882). Plaintiff in an action to quiet title claimed under a patent issued under the mining laws of the United States less than five years before the commencement of the action. Defendant averred fifteen years' adverse possession. *Held*, he could

not have held adversely to the government, and the action was brought within the statutory period after title acquired by the patentee.¹

McTarnahan v. Pike, 91, 540 (1891). Plaintiff in ejectment had entered the land in dispute in the Land Office as a placer claim; and it was held that no title by adverse possession prior to the date of that entry could be acquired, as the Statute of Limitations did not run against the government.

Saterfield v. Randall, 44, 576 (1872). Where one claimed adverse possession of land for the period of limitation, and the evidence showed the land to be unfit for cultivation, but chiefly valuable for timber and mining purposes, it was error to instruct the jury that the occupation must be "continuous; that is, from day to day, month to month, and from year to year."

Colvin v. McCune, 39, 502 (1874). Quarrying stone is an act indicating adverse possession under the Statute of Limitations.

Arnold v. Stevens, 24 Pick. 106 (1839). The occupation and cultivation of the surface is not evidence of adverse enjoyment of the right to dig ore; and the mere non-user for forty years of the right to dig ore will not extinguish such right. "As the right was neither acquired nor evidenced by use, so we think it cannot be lost by misuse. And as there was no adverse enjoyment to raise the presumption of a conveyance or release of it, the right of those holding the written title remains unimpaired."

Davis v. Clark, 2, 310 (1875). In actions to recover mining claims where not held under United States patent, the Statute of Limitations which controls is the special law, Cod. Sts., 591, secs. 2 and 4, and not the general statute as to real estate.

Pardee v. Murray, 4, 234 (1882). Possession of the surface of a lode claim is possession of all veins, lodes and ledges whose tops or apices are within the surface lines, and possession of such surface protects all such veins, lodes and ledges from the operation of the Statute of Limitations. No adverse possession could become operative by sinking a shaft to such a vein outside of the surface boundaries on what was claimed to be another location. In such case, the statute would begin to run only from the time at which it became known to the prior locator that the adverse claimant had entered into possession of a vein whose apex was within his surface boundaries.

King v. Thomas, 6, 409 (1887). The Statute of Limitations does not run against a mining claim until patent thereto has been issued by the United States, any State or Territorial legislation to the contrary notwithstanding, except as between parties both of whom claim by possessory title only.

Mayer v. Carothers, 14, 274 (1894). Where it is sought to establish adverse possession of a mining claim during the period of the Statute of Limitations, that statute does not begin to run until the issuance of a patent. *King v. Thomas* followed.

McCowan v. McClay, 16, 234 (1895). The term "adverse claim," as used in Rev. Stats. 2332, means adverse claim filed as required by Rev. Stats. 2325, in opposition to an application to a patent. Where

¹ *Redfield v. Parks*, 132 U. S. 239.

such an adverse claim is filed, Rev. Stats. 2392 is without application. The purpose of this section is to enable applicants who have been in possession of their claim for the period of the Statute of Limitations, but who are unable to make full proof of their rights, to obtain a patent when there is no one opposed to them.

Nevada. *420 Min. Co. v. Bullion Min. Co.*, 9, 240 (1874). When an action on an adverse claim is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in the State courts, irrespective of the acts of Congress. Consequently the State Statute of Limitations may be applied.

South End Min. Co. v. Tinney, 35 Pac. 89 (1894). Gen. Stats. sec. 3632 applies to patented as well as to unpatented claims.

South End Min. Co. v. Tinney, 38 Pac. 401 (1894). Against a plaintiff in ejectment claiming the legal title to a mining claim, the Statute of Limitations does not begin to run until the date of the patent by which he acquired that title.¹

New York. *Marvin v. Brewster I. M. Co.*, 55, 538 (1874). The rights of the mine owner are not extinguished by non-user. To found an adverse possession by the surface owner, there must be some act on his part adverse and hostile to such rights, and which prevents the exercise thereof, as by an assumption of a control over the ore by digging it, or by preventing the owner from doing so. Filling up old cuts in veins made before the severance of the estates is not such an act.

Oregon. *Rader v. Allen*, 27, 344 (1895). The limitation contained in Hill's Ann. Laws, sec. 2178, does not apply to one claiming under a patent from the United States.

Pennsylvania. *Caldwell v. Copeland*, 37, 427 (1860). Title to mines distinct from the title to the surface may be made out under the Statute of Limitations. Possession of the surface for more than twenty-one years does not carry with it the possession of the coal below it, where the title to the minerals has been severed from that to the surface by deed. When the surface owner seeks to establish title to a mine by adverse possession under the statute in opposition to his deed, he must prove possession of the mine as such independently of his possession of the surface.

Armstrong v. Caldwell, 53, 284 (1866). "It is, no doubt, the general presumption that a party who has possession of the surface of land has possession of the subsoil also, because, ordinarily the right to the surface is not severed from the right to the strata below the surface. But this presumption does not exist when these rights are severed. Each then becomes a distinct possession. In such a case, the possession of the surface, following the right, is as distinct from the possession of the minerals or subsoil strata which have been severed in right, as is the possession of one tract of land from that of another not in contact with it. Hence it is settled that when by a conveyance or reservation a separation has been made of the ownership of the surface from that of the underground minerals, the owner of the former can acquire no title by the Statute of Limitations to the minerals, by his exclusive and

¹ *Redfield v. Parks*, 132 U. S. 239.

continual enjoyment of the surface. Nor does the owner of the minerals lose his right or his possession by any length of *non-user*. He must be disseised to lose his right; and there can be no disseisin by act that does not actually take the minerals out of his possession. There seems to be no reason why the Statute of Limitations should not be held applicable to all corporeal hereditaments, including those that are only, sub-surface rights. . . . In *Caldwell v. Copeland* it was said that adverse possession of the mine by the owners of the surface for the statutory period would avail as title. But such possession must be distinct from that of the surface. It is unaided by surface rights or surface occupancy. What, then, is adverse possession of the coal in a tract of land, in a case where the owner of the land has by deed severed the ownership of the coal from the ownership of the surface? Its nature cannot be changed by the fact that it is more difficult of enjoyment. Like adverse possession of every other corporeal hereditament, it must be actual (as distinguished from constructive), exclusive, continued, peaceable and hostile for twenty-one years in order to give title under the Statute of Limitations. There is no reason for adopting a less stringent rule. The owner of the surface can acquire title against the owner of the minerals underneath by no acts or continuous series of acts that would not give title to a stranger. If the owner of a coal mine is not in actual possession, and the owner of the surface, or any other person, digs pits or drives adits into the minerals, and carries on mining operations there continuously for the statutory period adversely to the right of any other, he may acquire a right. In such a case he takes actual possession of the entire body of minerals in the tract of land. He may therefore acquire a title to the whole. But inasmuch as there cannot be any residence upon the coal, or cultivation without continual *pedis possessio*, or retention of the hold upon the mine, there can be no ouster of the owner, and consequently no acquisition of a right. If one digs turves or cuts wood upon another's land for his own family use, and if he even sells some of the turves he dug or the wood he cut to the neighbors, it is not pretended that he can acquire title to the land by such conduct, though repeated at intervals through the whole period of twenty-one years. . . . The court below, therefore, erred in leaving to the jury to find that the plaintiff had acquired title to the coal by having taken out some of it for family and neighborhood uses, at intervals during twenty-one years, without any evidence that the taking had been constant and continuous."

The grantee of coal having made his first entry on the vein more than twenty-one years after his title accrued, the statute is not *prima facie* a bar. Having the title, the possession is presumptively in him or those holding under him, and the burden of proof is on one claiming adversely to him.

Kingsley v. Hillside Coal & Iron Co., 144, 613 (1892). When by a sale the ownership of unopened coal has been severed from the ownership of the surface, the subsequent possession of the surface by the vendor and his successors in title without opening the coal is not hostile to the owner of the coal; nor will a delay by the latter in opening up and taking actual possession of the coal affect his title thereto.

Plummer v. Hillside Coal & Iron Co., 160, 483 (1894). Where there has been a severance in title of the surface from the underlying coal, the continued occupancy of the surface by the vendor is not hostile to the title of the owner of the underlying estate, and will not give title under the Statute of Limitations. To affect the title of the owner of the coal, there must be an entry upon his estate and an adverse possession of it.

Moreland v. Frick Coke Co., 170, 33 (1895). Where there has been a severance of the title to the coal from the title to the surface, one who subsequently becomes entitled to the surface by adverse possession for the statutory period does not thereby acquire a title to the coal.

The plaintiff here exercised no rights of ownership over the coal. He was present at the negotiation for its sale, and made no objection. The coal was assessed for taxation separately from the surface, and plaintiff paid taxes only on the latter. He stood by while defendant mined, and made neither protest nor demand for compensation.

Lulay v. Barnes, 172, 331 (1896). Where the underlying coal has been severed from the surface, possession of the surface by the surface owner is not adverse to the owner of the coal. The latter was not bound to take possession of the coal, and his title was not affected by his mere failure to do so.

McBee v. Loftis, 1 Strob. Eq. 90 (1845). The right of mining can only be acquired by deed, and is not forfeited by a non-user of less than twenty years.

Wilson v. Henry, 35, 241 (1874). In an action brought by one claiming under a tax deed recorded in 1858 to bar the title of the original owner, it was error to reject evidence offered by defendant to show that from 1858 to the commencement of the action during the mining season of each year from two to ten miners had constantly worked and mined for lead ore upon said land, they being usually farmers, working their farms during the summer and mining during the winter, and working the land under verbal leases from defendant or his agent, to whom they paid rent; also "that a custom exists where the land is situated, making it obligatory upon the land-owner to hold mineral diggings for the miner operating them, during the summer season, though the miner does not work during such summer season;" also that said mining was mostly near the surface and in open cuts so as to be plainly visible to all.

This evidence would not only disprove and destroy the constructive possession of the plaintiff, but would turn the Statute of Limitations against him by showing the actual possession and occupancy of the former owner.

Stephenson v. Wilson, 37, 482 (1875). Mining operations on land or its possession for the purpose of mining constitute an effective adverse possession as against a tax deed. "It may be difficult to lay down any precise rule as to the extent to which such mining operations should be carried on, to have that effect, but should the facts be established which it was proposed to show in *Wilson v. Henry*, 35 Wis. 241, we should deem them sufficient for that purpose." "Acts of mining and digging for lead ore upon the land, acts which are not merely

occasional, fugitive, and desultory, but are as continuous and constant as the nature of the business and customs of the country permit or require, do amount to such an assertion of ownership and possession as will interrupt the running of the statute in favor of the tax deed."

Wilson v. Henry, 40, 594 (1876). "It is settled in *Wilson v. Henry* and *Stephenson v. Wilson* that occupation under paper title by mining operations, continuous, visible, and notorious, may constitute actual adverse possession. And we have no doubt of the correctness of the rule. Sec. 7, ch. 138, Rev. Stats., was undoubtedly framed mainly in view of agricultural occupation; and in the circumstances of the State was undoubtedly wise and just. But though mining is a less general and important, it is still a frequent and important, industry here, entitled to protection as well as agriculture. It is not protected by the statute as agriculture is, but there is no reason why it should be proscribed by the statute, and we have seen that it certainly is not. While the law remains as it is, it is not an open question in this court that mining operations may constitute actual adverse possession."

Stephenson v. Wilson, 50, 95 (1880). *Stephenson v. Wilson*, ante, and *Wilson v. Henry*, 40 Wis. 594, followed and quoted with approval.

CHAPTER XIX.

RIGHTS OF MINE OWNERS.

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| <ul style="list-style-type: none"> I. Working and Surface Rights. II. Rights of Way. <ul style="list-style-type: none"> A. Incident to the Grant or Reservation, or expressed therein. B. Given by Statute. III. Timber Rights. | <ul style="list-style-type: none"> IV. Tailings and Refuse. <ul style="list-style-type: none"> A. Property therein and their Deposit on the Land. B. Pollution of Streams. V. Drainage. |
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I. WORKING AND SURFACE RIGHTS.

THE right to work mines when they are not severed from the inheritance has been discussed in the first chapter of this work. The subject for present discussion is the rights of the owner of minerals when the property in them forms a distinct inheritance or possession from that of the soil.

It is a general rule of law that, when anything is granted, all the means of attaining it and all the fruits and effects of it are also granted; when uncontrolled by express words of restriction all the powers pass which the law considers to be incident to the grant for the full and necessary enjoyment of it. Consequently a grant or reservation of mines gives the right to work them, to enter and to mine, unless the language of the grant itself provides otherwise or repels this construction. And this right is so inseparable from a grant of minerals, that not only is it necessarily an implied incident thereof, but it and its derived rights cannot be restrained or excluded by a special affirmative power to do other acts, or by a grant of other privileges necessary or convenient to the working of mines.

The right to work the mine involves the right to penetrate the surface of the soil for the minerals, to remove them in the manner most advantageous to the mine owner, and to use such means and processes in mining and removing them as may be necessary in the light of modern improvements in the arts and sciences.¹ The

¹ Controlled, however, by such legislation as may be enacted for the protection of the lives, health, safety, and welfare of miners. The statutes on this subject are treated of in Chapter XXV, Div. II.

owner is not limited to such appliances as existed at the time of the grant; he may freely employ the means of invention; he may erect all adequate modern machinery for mining and draining. What is thus reasonably necessary is a question of fact which a jury may determine from the circumstances of each case.

The bare right to work carries with it the right to use so much of the surface as is reasonably necessary. The mine owner has the right to enter and take and hold possession even as against the owner of the soil, and to use the surface so far as may be necessary to carry on the work of mining, even to the exclusion of the owner of the soil. What is necessary and reasonable may be determined by reference to what is customary, and is a question of fact. The fact that the owner of minerals owns adjoining land through which he could reach his mines does not diminish his right to use the surface above his minerals.

He may not, however, use the land for the purpose of converting the mineral he extracts into other material, as coal into coke, or any process of manufacture or refinement; though it has been said in a Massachusetts case that one having a right to quarry building stone might hew and prepare it on the land. The general rule, however, is that the owner of the minerals may only procure his property in its first marketable state, and for this purpose may make use of the material afforded by the land in which his minerals are found.¹

The owner of a mine is, however, limited in his use of the surface and of the material produced by the land, by his necessity. He may not have or use that which is merely convenient, or valuable, or important; he is confined to that which is necessary, indispensable, to the reasonable use and enjoyment of his property in the mineral; but he may have this in a convenient way.

Most frequently the privileges above described as impliedly incident to the right to mine are expressly granted or reserved in the instrument creating a mineral estate; but their character and extent are not altered by this expression, though there may be of course express privileges added which would not otherwise be implied. These rights do not create an estate in the surface, but are easements to do certain acts thereon. Consequently, ejectment will not lie by the owner of the minerals for the surface which is necessary to his mining; it was so held in Illinois. In Pennsylv-

¹ See, however, *Brown v. Torrance*, p. 583, post.

vania, however, it has been held that the mine owner may maintain ejectment against an intruder upon the surface, on the ground that the former's possession will be presumed to be necessary against a wrongdoer; and it is an easy inference that he might maintain such an action against any one for such part of the surface as was necessary to carry on his operation. This is opposed to the conclusion in the Illinois case.

Where an express privilege is given, it does not carry with it an obligation to make use of it. The lessee may, if he has them, make use of other means of getting his mineral.

On the other hand, surface rights and the incidental rights, such as that to use shafts, whether expressed or left to implication, may be used for the purpose only of mining under the particular premises conveyed, and not as a means of removing minerals from other lands.¹ This, of course, may, however, be changed by the terms of the contract, as in *Genet v. D. & H. Canal Co.*, 122 N. Y. 505, p. 582, *post*.

Alabama. *Williams v. Gibson*, 84, 228 (1887). The express grant of all the minerals in a tract of land is, by necessary implication, the grant also to work them, unless the language of the grant itself repels this construction. This involves the incidental right to penetrate the surface of the soil for the minerals, and to use such means and processes for the purpose of mining and removing them as may be reasonably necessary in the light of modern inventions and of improvements in the arts and sciences, but without injury to the right of support for the surface or superincumbent soil in its natural state. What is thus reasonably necessary is a question of fact to be determined by the jury from the circumstances of each case. The expression, in the grant, of timber and water privileges and of a right of way does not exclude the implication of other privileges necessary for working the mines.

The deed in this case conveyed "all the coal and other minerals in, under, and upon" the land, "and also all timber and water upon the same necessary for the development, working, and mining of said coal, etc., and the preparation of the same for market, and the removal of the same; and also the right of way and the right to build roads of any description over the same necessary for the convenient transportation of said coal, etc., and the conveying and transporting to and from said lands all materials and implements that may be of use in the mining and removing of said coal," etc. The grantee occupied three acres of surface, and erected five miners' houses, four cabins for the use of employees, an air shaft for ventilating the mines, a powder house, blacksmith's shop, and store. In ejectment by the owner of the surface, the necessity of these was for the jury. Defendant was entitled to

¹ See Div. II., this chapter.

produce evidence to show their necessity. The proximity of others might be proved to show that the store was unnecessary.

The grantee had no right to erect coke ovens for converting coal into coke.

California. *Dietz v. Mission Transfer Co.*, 95, 92 (1892). A deed of a part of a tract of land excepted "all oils, petroleum, asphaltum and other kindred mineral substances," and "the right to erect machinery, sink wells, bore, tunnel, dig for, work on and remove the same from the premises," also rights of way, and the right to lay pipes.

The grantee of the balance of the tract and the reserved minerals has not the right to use the land in the first deed for the purpose of pumping or storing oil found on other portions of the tract.

Illinois. *Walker v. Tucker*, 70, 527 (1873). By a lease of farming lands and a right to mine for coal, there was also demised the use of certain cars, a barn, blacksmith's shop and tools, and "all other property and fixtures connected with the working of these coal mines."

"It is not pretended that these words are inoperative, and that appellants acquired through them nothing but the right to mine for coal; nor can it be said that this property would have passed to appellants, as an incident to the right to mine for coal, had the language quoted not been used. Unquestionably this property was deemed valuable and important in connection with working the mines, nevertheless it was not indispensable. . . . Even if property of this kind had been indispensable to successfully working the mines, still this particular property could not have been, for it is evident from the description that its place could have been supplied from other sources."

Leavers v. Cleary, 75, 349 (1874). The owners of coal lands entered into a contract with a coal company by which they sold all the coal, coal oil and other minerals contained in the lands to the company, and conveyed to it ten acres of land for about half its value, in which the company agreed to sink a shaft to the depth of two hundred and thirty feet for the purpose of mining coal. If within that depth a vein of coal of sufficient thickness and such quality as to justify mining the same should not be found the land was to be reconveyed, the price thereof refunded, and the expense of sinking the shaft borne by the owner; if coal should be found, the company was to pay the owners ten cents for each ton raised. Coal was found, and the mines worked for seven years, when the company sold out to another, who acquired adjoining lands and proceeded to cut through to these latter, with the intention of abandoning working in the original mine, but still using the shaft described. *Held*, the intention of the parties to the contract, by which the assignee was bound, was to confine the operations to the land of the grantor, and that the shaft could only be used for taking out coal from those lands. An injunction against the assignee, restraining him from running entries from the shaft to his adjoining land, was granted.

Ewing v. Sandoval Coal & Mining Co., 110, 290 (1884). A deed granting the right to mine and excavate for coal and remove the same from under a tract of land carries with it the right to go upon the land and dig for coal or sink a shaft.

King v. Edwards, 82 Ap. 558 (1889). An express privilege to use the surface to open mines, sink shafts, etc., does not involve an obligation to do so on the premises. The lessee was not compelled to go on the land if he could get the coal without doing so.

Consolidated Coal Co. of St. Louis v. Schmisser, 34 Ap. 512 (1890). A. sold and conveyed to B. all the coal underlying a large tract of land, and for the purpose of enabling him to sink pits or shafts, and successfully mine and remove the coal, eleven acres, a part of the tract, for thirty-five years, "unless the said coal shall be sooner exhausted, in which event said lease and the right to mine said coal shall cease and expire." *Held*, that the grantee of the coal might not use the shaft sunk by him upon this ground to bring to the surface coal mined by him under adjoining land, nor could he transport such coal through the land of A. Such a use of the land was not contemplated by, nor is it within the terms of, the contract, and it will be enjoined.

Peters v. Philipps, 63, 550 (1884). Plaintiff leased to defendant certain lands for the purpose of mining coal, and defendant agreed to have the mine opened and in operation within nine months, and not to allow the mine to stand idle for more than sixty days at one time, and to pay plaintiff a royalty upon the coal taken out, that being the only consideration. *Held*, plaintiff had a right to demand that defendant prosecute the mining of coal on his land with reasonable diligence, and to an injunction restraining defendant from using the shaft sunk on his land for the purpose of mining coal on an adjoining tract, which defendant had leased, while the mining on the land in question was neglected.

Inhabitants of Worcester v. Green, 2 Pick. 425 (1824). The proprietors of Worcester in 1733 passed a vote "that a hundred acres of the poorest land on Millstone Hill be left common for the use of the town for building stones." This was held not to pass the land itself, which was subsequently granted by the proprietors to other persons, and against whose successors in title the inhabitants could not maintain trespass for cutting wood thereon.

Wilde, J.: "By a grant of mines the grantee has the power to dig and carry away only; the land itself does not pass, unless it be by feoffment and livery of seisin. . . . The grantee may maintain trespass *quare clausum fregit* for any wrong done him, but he has not a fee in the land."

Green v. Putnam, 8 Cush. 21 (1851). "The grant of the right to the stone carries with it as a necessary incident the right to enter and work the quarry, and to do all that is necessary and usual for the full enjoyment of the right, such as hewing the stone and preparing it for use."

Erickson v. Michigan Land & Iron Co., 50, 604 (1883). The owner of land conveyed it, reserving and saving to himself all ores and minerals, slate, building stone, etc., on or beneath the surface thereof or any part thereof, with the right to enter and explore therefor, to mine, smelt, refine, quarry, dress and remove the same, and for these purposes to construct and maintain buildings, machinery, roads, to sink shafts, remove soil, occupy as much of said

lands, and use and divert such streams and pools of water as might be necessary and convenient for the successful prosecution of the business. It was further provided that in the case of permanent occupation of any land, compensation for the surface right thereto should be paid by the grantor or his assigns to the grantee or his assigns.

This is not a mere grant of the surface: it passes the fee, except certain contents. Whatever surface rights are reserved by the grantor are no more than easements, supposed or intended to attach to the ownership of the mineral, or privileges. Easements to do such acts as are reasonably necessary to get out the mineral and remove them may be granted or reserved so as to attach to the mining estate. The use of the surface of the land here for shafts or other excavations or erections made and used solely for the purpose of mining is in the nature of an easement which is appurtenant to the mine. Ejectment will not lie for this land. But under the terms of the deed the grantee is entitled to compensation therefor. This cannot be enforced by ejectment.

Missouri. *Wardell v. Watson*, 93, 107 (1887). By a grant of minerals in place the right to dig and remove them passes. A reservation of mineral and mining rights is construed as a grant. In either case the owner of the mineral estate has the right to dig and take minerals. And for this purpose he has the right to enter and take possession even against the owner of the soil, and to hold such possession and use the surface so far as may be necessary to carry on the mining, and this without express authority. An expressed reservation of the right to sink air shafts does not exclude the other implied rights incident to the mineral estate. Nor does the fact that the owner of the mineral estate owns adjoining land through which he could reach the minerals deprive him of the right to mine through the surface directly overlying the minerals.

New Jersey. *Silsby v. Trotter*, 29 Eq. 228 (1878). A licensee who constructs a tunnel for mining purposes, under authority of his license, with his own funds, for which he is to be reimbursed out of the licensor's share of the profits of ore mined for their joint benefit, will be held to have an exclusive right to the use of the tunnel, so far as is necessary to enable him to get the ore which he has a right to take, provided he uses reasonable diligence. But where the licensee's operations do not require such exclusive use, the licensor or his grantee is entitled to use the tunnel, but his right is subordinate to that of the licensee.

Manganese Co. v. Trotter, 29 Eq. 561 (1878). In the contract which in the last case was construed to be a license the grantor reserved the right to mine and furnish the zinc ore to which the grantee was thereunder entitled. It was accordingly held that if the licensor elected to use his reservation, and mine and furnish the ore to the licensee, then the licensor would have the right to the exclusive use of tunnel in dispute.

New York. *Marvin v. Brewster Iron M. Co.*, 55, 538 (1874). A grant of minerals in land gives a right to mine for them, unless there is a positive restriction in the grant itself. This right to mine carries with it the right to penetrate to the minerals through the

surface for the purpose of digging them out and removing them, in such manner as is most advantageous to the owner of the right to mine, provided the surface is not wholly destroyed. He has the right to sink a shaft vertically or to drive a way horizontally, or to do both in different places, so that he may reach the minerals and take them out from below the superjacent earth, following the vein of ore with excavations below the surface; always, however, under the restriction that what he does, it is necessary for him to do, for the reasonable use and enjoyment of his property in the minerals. This right is not excluded by a stipulation for other particular privileges in the terms of the grant, as, in this case, by the privilege of going to and from all beds of ore, etc. Nor is this right limited to the methods in vogue when it was acquired; the mine owner may keep pace with the progress of invention, as by introducing the use of steam. He may not, however, claim as an incident to the grant that which is convenient; he may have only that which is necessary, but may have that in a convenient way. This test must be applied to determine the question whether the mine owner may erect and maintain upon the surface a tramway, a barn, a powder house, and a blacksmith shop. Ordinarily the mine owner cannot justify the use of the surface for the long keeping of his ore or deposit of his rubbish from the mine or the erection of buildings for storing materials, for the use of artisans or for housing animals. The necessity of so doing in order to mine with reasonable profit must be shown.

Genet v. D. & H. Canal Co., 122, 505 (1890). Plaintiff "leased" to defendant "all the coal contained on, in, or under" a certain tract, without limitation as to time, "to include all the coal that can be economically mined or taken out," with the right to enter, mine and remove the coal. Plaintiff further granted rights of way for roads, ditches and drains, "with the right to erect drains on the surface for the proper mining of said coal," also the use of the land for digging air shafts, erecting necessary buildings, "together with lands for piling coal or culm, and all other appurtenances they may require for mining, etc., the coal to be mined under this agreement."

And it was further agreed and understood that the defendant might "use and occupy the rights and privileges hereby granted, and the openings, buildings, fixtures and appurtenances made and constructed by them for the mining, preparing and forwarding coal under this agreement, for the mining, preparing and forwarding coal from any adjoining or contiguous lands until all the lands that they desire to take coal from and that can be mined and taken out through said openings, shafts and slopes, shall be exhausted."

The defendant acquired a present absolute and distinct right to use the shaft and structures for the mining, removing and forwarding of coal from adjoining tracts belonging to it. This right was not postponed until after the exhaustion of the demised coal. It included the right to pile upon plaintiff's land the culm or refuse taken from the adjoining lands. It also included the right to drain water from the mines on the adjoining land to the shaft on plaintiff's land, and thence to pump it out. The defendant had a right to unite its works on all the properties into one mine.

Pennsylvania. *Turner v. Reynolds*, 23, 199 (1854). One who has the exclusive right to mine coal upon a tract of land has the right of possession of the soil so far as is necessary to carry on his mining operations. As against an intruder it will be presumed that the possession of the soil is necessary, and the owner of the coal may maintain ejectment therefor.

Davis v. Moss, 38, 346 (1861). A lease of the entire mining right of and to a certain piece of land, with the privilege of erecting the necessary machinery and buildings, passes so much of the surface as is necessary to the enjoyment of this right, and an engine erected on the surface is attached to the subject of the grant, and is subject to the law relating to fixtures.

Brown v. Torrence, 88, 186 (1878). If the owner of coal makes use of the surface for operating coke ovens, and by the smoke and dirt therefrom injures the crops of the surface owner, he will be liable for the damage.

Bronson v. Lane, 91, 153 (1879). A conveyance of an oil and mineral right in certain land that amounted to an exclusive right to all the oil therein for ninety-nine years, expressly granted "the right to enter upon the said premises to dig or bore for oil or other minerals, saving and excepting lead ore; free right of ingress and egress, the right to erect such and so many derricks and engine-houses and other structures as may be needed in the legitimate business of prospecting for, producing and transporting oil or other minerals, the right to use so much of the timber," etc.

This was an express grant of exclusive occupation of so much of the land as was necessary for the enjoyment of the thing granted. It is no objection that upon such a construction the grantee might sink a well on every acre and effectively deprive the grantor of the entire surface.

Rockafellow v. Hanover Coal Co., 12 C. C. R. 241; s. c. 2 Dist. Rep. 108 (1892). The owner of underlying minerals may not use the surface or surface privileges for the purpose of removal of minerals from adjacent lands, and such use will be enjoined.

Lance v. Lehigh & Wilkesbarre Coal Co., 163, 84 (1894). The lease provided that for the purpose of "making openings, erecting a breaker and necessary machinery, constructing railroads for sidings, and depositing culm, the said party of the second part shall have so much surface as may be necessary for breaking and operating and removing the coal mined upon the premises." This provision was in case of the lessor. It gave the lessee the right to use the land if he saw fit. The erection of his breaker and the piling of culm upon other land was not a breach of covenant.

Texas. *Cowan v. Hardeman*, 26, 217 (1862). The right to minerals reserved carries with it the right to enter, dig, and carry them away, and all other such incidents thereto as are necessary to get them.

Utah. *Snell v. Wasatch & Jordan Valley R. Co.*, 3, 192 (1882). The grant of the exclusive right to quarry rock from the lands of the grantor, with the right of way to move the same, is not a grant of exclusive possession of the land, or any possession except for the sole purpose of enjoying the right and privileges created by the grant.

Such grantee cannot authorize a railroad operated for the general public to be constructed over the land, even though the major part of its business be the transportation of the rock quarried under the license. If he does, the grantor, as the owner of the fee, may maintain ejectment against it.

II. RIGHTS OF WAY.

A. *Incident to the Grant or Reservation, or expressed therein.*

Where minerals are granted or reserved out of land, the owner of the minerals has a right of way of necessity over the land to and from the mines. The minerals are in the same position as a close, granted by one whose land surrounds it, or reserved by him out of a grant of the surrounding land. This right of way is a genuine way of necessity, and is subject to the same rules as other ways of necessity.

Usually, however, the grant or reservation of minerals contains express powers or privileges as to rights of way, and the questions that usually arise in respect to ways involve the interpretation of these privileges.

The mine owner's implied right of way must be over the land. He has not an implied subterranean right of way, although such a road would be more convenient than one above ground. The right of way exists only in the land of the grantor, or that out of which the mines were reserved; consequently, where the fee of a highway is in a municipality, the owner of minerals on the side thereof has no right of way under the highway to his land on the other side of the highway. Where, however, there is only a public easement in the highway, the abutting owner owns the fee, and has a right of way under the highway, provided he does not interfere with or imperil the easement.

Rights of way annexed to rights to mine, or granted for the purpose of removing and transporting minerals from and materials to the mine, may not be used for other purposes, as for general railroad purposes; nor, in the absence of express provision, can they be used for the transportation of minerals from other mines. And consequently the owner of the mineral, with the privilege of a right of way, may not give to others the right to use that right for general or other purposes of transportation. When the mine owner exceeds his right in any of these ways, the land owner's remedy is by an action on the case, and not in assumpsit for use and occupation.

Where subterranean rights of way are granted, they are subject to the same general rules as ways upon the surface. The owner of the fee may construct a road or tunnel crossing such ways upon the same level, provided he does not destroy or substantially impair the use thereof. A right to construct a subterranean way for the purpose of mining and removing coal on adjoining premises is confined to a way above the soil lying immediately below the vein which is being worked. Where adjoining mines are in the same possession, and it is convenient to work one of them through a shaft or pit made for the other, the right to do so does not exist, in the absence of express power. The owner of the fee may prevent the use of his land in connection with the working of other mines. And where, in addition to a grant of minerals, a power is conferred to transport mineral found in the mines over, through, or under the land, this power is annexed to the grant, which cannot be surrendered without abandoning the use of the right of way. And if such a surrender is made, and the grantee continues to use the right of way, he may be held to the payment of rent so long as there is any mineral in the land. Where, however, the mine owner has a fee in the mineral, he likewise owns the space occupied by the mineral, and having removed a part of the mineral, may use the space thereby vacated for any purpose which he may choose. He consequently may carry mineral from adjoining land through that space. Whether this right would exist after the exhaustion of the minerals is doubtful. But where the right is expressly granted, it is not terminated by such exhaustion.

Illinois. *Matthiesson & Hegeler Zinc Co. v. La Salle City*, 117, 411 (1886), affirming s. c. 16 Ap. 69 (1884). Where the fee of the streets of a city is in the municipality, the owner of coal under a lot abutting on such a street may not run entries through the soil under the street in order to reach the coal, and mine and remove the coal through a shaft belonging to him located on the other side of the street. He will be enjoined from making such entries.

Sholl v. German Coal Co., 139, 21 (1891). Where the owner of land conveyed a described piece thereof, and "also the privilege of mining for coal under" an adjoining tract of one acre, the grantee has no further rights under this latter clause after all the coal is mined from the one-acre tract. He has then no right to pass over it from the first piece of land to another upon which there is a mine.

Massachusetts. *Farnum v. Platt*, 8 Pick. 339 (1829). Where the way used for access to a quarry whose use, reserved in a deed, was not limited or defined, and the way commonly

used was shut up by the owner of the land, the owner of the right to quarry had a right to pass to and from it in any course least prejudicial to the owner of the land.

Pomeroy v. Salt Co., 37, 520 (1882). The general rules of Ohio law which govern rights of way upon the surface are equally applicable to subterranean rights of way. The owner of coal lands through which another has the right of way by subterranean entry to reach coal mines in an adjoining tract, may lawfully construct an entry crossing such right of way on the same level, provided it be done without destroying or substantially interfering with the use thereof.

Hasson v. Oil Creek & Allegheny R. R. Co., 8 Phila. Pennsylvania. 556 (1871), Com. Pl., Venango Co. The owner of land, taken by a railroad by right of eminent domain under the general railroad law, retains the enjoyment of the fee subject to the right of way of the railroad company; he retains the exclusive right to use the land for every purpose consistent with the public franchise. He is entitled therefore to drive pipes under the railway for the conveyance of oil, etc., such use being shown not to interfere with or imperil the easement of the railroad company. Interference with such right may be restrained by injunction.

McCloskey v. Miller, 72, 151 (1872). A. sold to B. all the coal under a tract of land, with privilege to use the railroad, fixtures, ropes, and wagons then employed by A. in and about his mine, and also to use the buildings and other improvements; the coal to be taken out in forty years.

Held, vendee had no right to use the railroad, improvements, etc., for removing other coal than that beneath the tract named.

The vendor's remedy is in case, and not assumpsit for use and occupation.

Park Co. v. Cummings, 7 Legal Gazette, 149 (1875), Com. Pleas. A reservation of the right "to pass through the said premises by any subterranean passages," to "mine and remove coal from any adjacent land," gives only the right to pass through the premises above the soil lying immediately under the vein which is being worked.

Rankin's Appeal, 1 Monaghan, 308 (1888). A reservation in a devise of all the coal under a tract of land, with mining privileges, entitles the owner of the coal to use an open pit mouth for mining his coal, and the road for transporting it, though he have no interest in the surface.

Bestwick v. Ormsby Coal Co., 129, 592 (1889). A contract executed by trustees who had the legal ownership of the coal, but not of the surface, granted and conveyed all the coal under a tract of land, the grantees covenanting to mine and remove four thousand tons of coal yearly, or pay for the same as though mined. The contract also granted to the party of the second part "the right of way through, over, or under said land, to transport coal from adjacent lands." It was provided also that the grantees, etc., "shall have the right to abandon this contract and yield up said coal mine and privileges at any time they shall determine in their judgment that said coal is in quantity, quality, or condition no longer minable with economy and profit." At a certain date the grantees delivered to the grantors a

deed of release and surrender of all the coal conveyed, and all the right, title, etc., of the grantees therein, but continued afterwards in the use of the way through the coal conveyed to coal operated by them on adjacent lands. The grantees were bound for the payment of the annual royalty so long as they retained possession and use of the right of way, and the fact that all the coal except the ribs had been removed was no defence, the grantors having the right to have all the coal removed, the right of the surface owner not being in question.

McCracken v. Gumbert, 131, 36 (1890). The owner of certain land sold all the coal underlying it, and agreed that the vendees should have the right of way for railroads over the surface at the crossing of ravines, and also the privilege of "forever hereafter running other coal from other lands through the entries and railways made and used in taking out the coal above granted." The vendor's land ended at a line in the bottom of a ravine about fifteen feet lower than the vein of coal, which consequently cropped out on both sides of the ravine. The vendees, having bought the right to mine under the adjoining land, built a railroad from one outcrop to the other across the ravine; and the vendor brought trespass, on the ground that the deed did not confer the right to build a railroad for the purpose of reaching other lands, but only of using such roads to carry coal from adjoining lands as had been already built for the use of the original tract. *Held*, that, in view of the fact that the parties were cognizant of the situation of the coal and of the character of the formation at the time of the conveyance, this view was erroneous, as tending to defeat the grant, and that there was no trespass committed in the crossing of the ravine.

Republic I. Works v. Burgwin, 139, 439 (1891). A decedent, at the time of his death, owned and was engaged in mining upon certain coal land, between which and the Monongahela River lay another tract of land owned by him. Across the latter ran a narrow gauge railroad, built by him to connect said coal with the river, and used exclusively to transport the products of his mine. In a proceeding for the partition of his estate by agreement of all parties, to certain of his heirs were allotted the coal, and also the railroad, with the right to maintain and renew the same forever, and with the additional right to "the parties named in the inquisition as owners of the coal and railroad" to build branch railroads on ten specified streets laid out on the partition plot. For nearly fifty years no attempt was made to construct any branch railroad, and the existing road was used for forty-five years exclusively as a coal railroad. In 1887, some years after the coal had been practically all mined out, the owners of the railroad attempted to build a branch road of standard gauge on one of said streets, for general railroad purposes.

It being clear, from the above facts, that the purpose of the provision in the decree, relating to the building of branch railroads, was to afford to the owners of the coal proper facilities for removing and marketing the coal upon it, said provisions did not justify the attempt to build a branch railroad not necessary and not to be used as an appendage to the coal property.

Lillibridge v. Lackawanna Coal Co., 143, 293 (1891). Holding

under a conveyance by which a fee passed to all the coal in certain land, the defendant mined out coal from one vein to such an extent as to make an open way from one side to the other of the tract, twelve feet high and two hundred feet beneath the surface, and, having become the owner of coal on an adjoining tract, was carrying the same through this way to its improvements for preparing it for market.

Plaintiffs having filed a bill to enjoin this use as an unlawful and wrongful appropriation of their property, — *Held*, the defendant acquired, together with the fee in the coal, the ownership of the space enclosing it, and the right to use it for any purpose it might see fit, and consequently to carry coal from the adjoining tract through it. "In a state of nature, the coal necessarily occupied space. How could the defendant own the coal absolutely and in fee simple, and not own the space it occupied? Or how is it possible to conceive of such a thing as the ownership of the space independently of the coal? If the coal in place is a part of the very substance of the soil, more corporeal than the surface, as was said in *Caldwell v. Fulton*, how can the law regard the space which the substance occupies, as other than the substance itself? Of course, such an idea is incapable of practical application, except upon the theory that the coal is not a corporeal substance to be sold and delivered, but that only an incorporeal right to remove it passes to the grantee under a conveyance. And such is the real nature of the appellant's argument. It could not be otherwise. Certainly if such were the nature of the defendant's right, the argument and the authorities cited in support of it would be applicable and of controlling force; but it is a sufficient reply to all of them to say that all the decisions are directly the other way, and that they all establish that a conveyance of the coal in fee carries everything with it just as fully and completely as a conveyance of the soil above." "No complaint is made in the plaintiffs' bill of either the deprivation or injury of any right growing out of the contract. The plaintiffs cannot possibly use any part of the space left by the removal of the coal, and hence they are not obstructed in the slightest degree. The right to use that space is exclusively in the defendant, and that use is not and cannot be questioned by the plaintiffs."

Rockafellow v. Hanover Coal Co., 12 C. C. R. 241; s. c. 2 Dist. Rep. 108 (1892). The principle of *Lillibridge v. Lackawanna Co.* does not render nugatory a covenant in a coal lease that no coal from adjacent properties should be mined through the workings or prepared by the improvements erected on the demised premises; and the breach thereof will be enjoined.

Stewart v. Northwestern C. & I. Co., 147, 612 (1892). The owner of coal lands contracted to "grant, bargain, sell and convey the stone coal lying and being under" a tract of land, with mining privileges, and with the right to erect machinery shops and houses on the surface, such as might be needed for the convenient and economical mining of the coal. The consideration was the payment of a certain royalty per ton, the purchaser to remove two thousand tons of coal each year, and to pay for that quantity whether it was removed or not, until the coal was exhausted. It was also provided that if the purchaser should find that by reason either of the "quantity, quality or condition of the

coal" it was not practicable to mine it with profit, he might abandon the contract and yield up the coal mine and privileges without mining the remainder of the coal. Another stipulation was that the purchaser should have "the right of way through, over or under said land to transport coal from adjoining lands . . . and the use of five acres of land" on which to erect dwelling houses, paying said first party a fair annual rental for said five acres of ground.

Held, that the grant of the right of way for operating the adjoining lands was independent of the sale of the coal and the mining privileges. *Held*, also, that after all the coal was removed, the lessee had simply a right of way through the chamber, and that the lessor was in possession by virtue of his ownership, and therefore the lessee was not by reason of the use of the right of way after the exhaustion of the coal liable for the royalty on two thousand tons.

Webber v. Vogel, 159, 235 (1893). L., the owner of a tract of land, conveyed to S. all the merchantable coal thereunder, together with the free and uninterrupted right of way into, upon and under said land at such points and in such manner as might be proper and necessary for the purpose of digging, mining, and carrying away said coal. S. conveyed to W., who was the owner of an adjoining tract, and who leased the coal under both tracts to V. V. claimed the right to take out the coal from both tracts through the shaft on the first, and to transport it over that tract by a road used by a former owner, who owned both tracts. He was *held* to have no right to use this way for coal mined from the adjoining tract.

This case is not governed by the rule that where an easement or servitude is imposed by the owner on one portion of his real estate, for the benefit of another, a purchaser of it at a private or judicial sale without an express reservation takes the property subject to such easement or servitude. The acceptance of the grant by W. restricted him and his lessee to the use expressed therein.

Lance v. Lehigh & Wilkesbarre Coal Co., 163, 84 (1894). The absolute owner of coal under a tract of land is entitled to transport coal mined from other lands through the gangways of the first mine on a railway resting on a bed of rock and refuse coal thrown down from the side chambers to make a foundation. *Lillibridge v. Lackawanna Coal Co.*, 143 Pa. 298, followed.

Pearne v. Coal Creek M. & M. Co., 90, 619 (1891). **Tennessee.**

M., the State's grantee, conveyed two hundred acres to B., two hundred to D., and the residue to S., who also acquired other adjoining lands. There was no practicable route to and from the D. tract except over S.'s lands. *Held*, a right of way of necessity existed over S.'s portion of the tract, but not over his adjoining lands.

This way was a way over the lands; the owner of the minerals might not have a way under the land for the transportation of his minerals, though more convenient than the road over the land.

The way of necessity should be laid out and established in such manner as to reasonably subserve the necessities of the dominant estate and not unreasonably injure the servient estate. The way should afford facilities for enjoyment not only of the surface, but of the minerals of the dominant estate. But when the way is claimed by the owner of

the minerals, he has no higher rights than if he owned both surface and minerals.

Reliance Coal Co. v. Kentucky Coal Co., 93, 191 (1893). The owner of a large tract of coal land leased lot No. 7 to complainant. By the lease, after giving to lessee the exclusive right of mining thereon, the lessor reserved the right "to build and construct houses, roads, railways, tramways, quarries, brickworks, sawmills, or other works or improvements, or to farm thereon all land not used or required by the second party for its works, which work is to have first consideration and preference;" and also the right to "the joint use, during the continuance of this lease, of all such portions of the above described lands as may be necessary for roads, railways, waterways, side-tracks, and other structures necessary for the profitable working of other lands of the party of the first part or its assigns in the vicinity of the above leased premises, but not to injuriously interfere with the working of the party of the second part." Subsequently the lessor made a lease of adjoining land to the defendant, and conveyed thereby "all such rights of making entries and erecting structures for mining purposes under, through, and upon the premises adjoining the above, known as lease No. 7, as the party of the first part is competent to grant."

Defendant's rights under these clauses were only to such surface ways over lot No. 7 as were necessary for the purposes of ingress and egress to the surface of defendant's land, and not to underground entries through lot No. 7.

The term "railways, waterways, side-tracks, and other structures necessary for the profitable working of other lands in the vicinity," means such surface ways and structures as are necessary for such ingress and egress.

"To hold that, under this language, underground entries could be made by defendant on complainant's premises, and underground ways could be cut through the coal under its surface, and that tipples, chutes, and other conveniences of a mining plant could be established on complainant's land, would be to subject it to such a servitude as would greatly damage, if not totally destroy, its value. . . . Such incumbrances and servitudes cannot arise unless they are expressly provided for, and reservations to that extent are made in plain, unambiguous terms. Such rights do not arise in favor of contiguous land-owners by implication of law, and such ways are not ways of necessity, and the question is not one of convenience but one of necessity."

Findley v. Armstrong, 23, 113 (1883). A vendor **West Virginia.** agreed in writing to sell to a vendee two hundred and thirty acres of land, the contract containing this clause: "The coal and coal privileges in the land west of B. run, heretofore sold and deeded are reserved. . . . The coal and all the coal in the land east of B. run, and all the necessary and desired coal privileges, are also hereby reserved." The vendor may not insert in the deed tendered in fulfillment of this contract a clause reserving "a right to remove on and through this tract of land the coal of coterminous tracts of land owned by the vendor." "The necessary and desired coal privileges" are confined to the coal under the tract sold.

In construing this contract parol evidence is inadmissible to show

that when the parties entered into the contract the vendor owned coterminous lands which would be much depreciated in value unless he could remove the coal on them through this tract, and that the vendee knew this.

Snell v. Wasatch & Jordan Valley R. Co., 3, 192 (1882).

Utah. The grant of a right to quarry rock from the land of the grantor, with a right of way to remove the same, is not a grant of exclusive possession of the land or of any possession except for the sole purpose of enjoying the license and easement created by the grant. Such grantee cannot authorize a railroad operated for the general public to be constructed over the land, even though the major part of its business be the transportation of the rock quarried under the license; if he does, the grantor, as the owner of the fee, may maintain ejectment.

B. *Given by Statute.*

Where mines are situated away from public highways, their development requires some connection therewith in order that their product may be carried to market. The difficulty of always obtaining rights of way over the land of intervening owners upon reasonable terms has been the cause of the enactment in several States of laws by which authority is given to mine owners to exercise the power of eminent domain, and construct roads from mines to public highways.¹ The constitutionality of these acts has been attacked on the ground that they authorize the taking of private property for private uses, and some of them have been declared unconstitutional, while others have been upheld.

The test of their constitutionality is the publicity of the use to which the road is devoted. An act providing for the taking of land in eminent domain for the construction of a private road,

¹ Rev. Stats. U. S. 2338; Alabama, Civ. Code 1886, secs. 1563-64; Arizona, Rev. Stats. 1887, 250; California, Code Civ. Proc., sec. 1238; Act March 31, 1891, sec. 2, p. 220; Act March 29, 1895, p. 89; Colorado, M. A. S., sec. 3145; Dakota, Comp. L. 1887, ch. 19, secs. 2018, 2028; Georgia, Code 1882, secs. 742-751; Laws 1887, p. 35; Idaho, Rev. Stats. 1887, secs. 3130, 3142; Illinois, Hurd's Rev. Stats. 1895, ch. 94, sec. 1, p. 1052; 3 Starr & Curtis Ann. Stats. 2738; Iowa, Rev. Code 1888, p. 440; Laws of 1874, ch. 34; Kentucky, Barb. & Car. Stats. 1894, sec. 815; Maryland, Pub. Gen. Laws, art. 23, secs. 145-156, p. 343-6; Montana, Pol. Code 1895, secs. 3630-41; Code Civ. Proc. 1895, sec. 2211; Nevada, Gen. Stats. 256-273; New Mexico, Act Feb. 28, 1889, p. 347; Ohio, Rev. Stats. 1890, sec. 3865; Oregon, Act Feb. 18, 1895, p. 6; Pennsylvania, Acts May 5, 1832, P. L. 501; April 16, 1838, sec. 19, P. L. 637; March 28, 1840, sec. 2, P. L. 196; April 20, 1858, P. L. 361; April 13, 1868, P. L. 92; June 13, 1874, P. L. 286; July 5, 1883, P. L. 176; April 14, 1893, P. L. 15; May 15, 1893, art. ix., P. L. 65; July 9, 1897; South Carolina, Act Dec. 23, 1886, sec. 15; Laws 1886, p. 544; Tennessee, Code of 1884, sec. 1999; Utah, Act March 12, 1890, ch. 37; Act April 5, 1896, ch. 95; Washington, Act March 11, 1897, ch. 60, p. 95; West Virginia, Code 1891, ch. 54, p. 539, sec. 69 a; Wyoming, Laws 1888, ch. 40, sec. 5.

exclusively under the control and devoted solely to the use of the party constructing it, would be void. Such a use would be a private use. So, as was held of the act of the Pennsylvania Assembly of June 13, 1874, the connection of two beds of minerals belonging to the same owner by a way passing through the land of another is a private use. But the mere fact that by the construction of the road a particular private use may be served will not render its construction an unconstitutional invasion of private rights, provided the road is a public road, serving a distinct public use.

Statutes, therefore, notably the important acts of Iowa and Pennsylvania, providing for the construction of roads and railroads from mines to public highways, whether roads, railroads, or navigable waters, have been held to be constitutional, because they provide for the condemnation and taking of land by means analogous to those by which land for public roads is taken; and the roads, when complete, are open to other mine owners and to the public upon the payment of proper compensation. Indeed, though often termed in the statutes themselves private roads, they are in their nature public, a part of the general road systems of these States. Another ground upon which the constitutionality of these acts has been maintained in Nevada,¹ and in the early cases in Pennsylvania, is the public advantage of the development of mines,² a position the validity of which is extremely doubtful.

Another right of way given to mine owners by statute is that granted by many of the Health and Safety Statutes for the purpose of such additional outlets as the mine owner may by the law be required to maintain. Right of eminent domain is often conferred on him to enable him to construct these outlets.³

California. Amador Queen M. Co. v. Dewitt, 73, 482 (1887). A patent for a mining claim contained, in accordance with Rev. Stats. 2338, the following condition: "That in the absence of necessary legislation by Congress the legislature of California may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development." Neither this nor the act of Congress operates as a reservation by the United States of a right of way through the claim

¹ Gen. Stats. 1885, secs. 256-273.

² And see *Butte, Anaconda, & Pac. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504.

³ Colorado, M. A. S. 3182; Illinois, Act June 30, 1885, sec. 12; Kentucky,

Barb. & Car. Stats. 1894, secs. 2722-39; Ohio, Rev. Stats. 1890, sec. 297; Pennsylvania, Acts June 2, 1891, sec. 2, P. L. 183; May 13, 1893, art. ix., P. L. 65; Washington, Gen. Stats. 1891, sec. 2239; West Virginia, App. to Code 1891, p. 994, par. 7.

which may be taken and used by another miner, whenever it becomes necessary to take and use it in working his mine upon such terms and conditions as the State legislature may prescribe. Sec. 1238, Code Civ. Proc., does not authorize the condemnation of a right of way through a mining claim for the private use of another mine owner in working his mine.

Colorado. *People, Ex rel. Aspen M. & S. Co. v. Dist. Ct. of Pitkin Co.*, 11, 147 (1887). Unless a State statute imposing an easement upon mining claims is in accordance with the State constitution, it cannot be enforced by our courts. The exercise of the right of eminent domain in favor of a mine owner for a private railroad over the mining claims of others is in conflict with the State constitution. Sec. 2407, Gen. Stats. of Col.; Rev. Stats. 2338.

Illinois. *Sholl v. German Coal Co.*, 118, 427 (1887). The use of a strip of land by a coal company upon which to construct a tramway leading from the coal works to a railroad track is a private use, and such strip cannot be condemned under the Eminent Domain Act for such use.

Iowa. *Bankhead v. Brown*, 25, 540 (1868). Plaintiffs having begun proceedings to establish a private road from their coal mine over defendant's land to a public road under the act of 1866, "to provide for the establishment of private roads," this act was held to be unconstitutional. The roads established thereby were private, because (1) the act denominates them such; (2) they may be established upon the petition of the applicant alone, and he pays the costs and damages; (3) the public are not bound to work or keep the roads in repair; (4) the applicant may apparently debar the public use thereof.

If the road in question had been established as a public road under the general road law, there would have been no doubt of its validity.

Jones v. Mahaska County Coal Co., 47, 35 (1877). While any individual or corporation owning coal land or stone quarries under sec. 1, ch. 34, Laws of 1874, may condemn a right of way thereto over the lands of others, yet the way so appropriated must be a public one, and if a road be constructed thereon, its use must be open to the owners of other mines or quarries upon the payment of proper compensation therefor.

Phillips v. Watson, 63, 28 (1884). A road or way established under ch. 34, Laws of 1874, over the land of another, to connect a mine or quarry with a railroad or highway, is a public way, in the sense that the public may use and enjoy it in the way in which roads and highways are ordinarily used by it; and the mine owner who procures it to be established must use the special privilege which the act confers on him in such a manner as not to destroy this right of the public or prevent its enjoyment. The act is not in conflict with the constitutional prohibition of the appropriation by law of private property to private use.

Nevada. *Dayton G. & S. M. Co. v. Seawell*, 11, 394 (1876). In Nevada the business of mining is for the public use, and the right of eminent domain may be exercised therefor. The act of May 1, 1875 (Stats. 1875, 111),¹ "to encourage the mining, smelting,

¹ Gen. Stats. 256-273.

or other reduction of ores in the State of Nevada," is constitutional. But in each case a necessity for the exercise of the power must be shown.

Overman S. M. Co. v. Corcoran, 15, 147 (1880). The act "to encourage the mining, milling, smelting, or other reduction of ores in the State of Nevada" (Stats. 1875, 111)¹ is constitutional. *Dayton G. & S. M. Co. v. Seawell*, 11 Nev. 394, followed. The facts of this case show the necessity of the exercise of the right of eminent domain. "It appears from the testimony that the lands in controversy were the most eligible and convenient; that no other lands could have been selected, except at great expense, and at places inaccessible to a railroad or to wagon roads, without which the business of respondent could not be successfully conducted. Upon a review of all the facts, it appears to our satisfaction that the appropriation of these lands to respondents will be of great benefit and advantage to the mining industry of Storey County; that it is necessary to condemn such lands for the protection and advancement of said interests, and that the benefits arising therefrom are of paramount importance as compared with the individual loss or inconvenience to appellants.

"This brings the case within the provisions of the statute, and shows that a necessity exists for the exercise of the law of eminent domain."

Douglass v. Byrnes, 59 Fed. 29 (1893), C. C. D. Nev. In condemning a right of way for a tunnel to a mining claim under Nev. Gen. Stats., secs. 256-273, a large discretion is necessarily vested in the petitioners in selecting the route of the tunnel, and this discretion will not be reviewed by the court unless they have exceeded the authority of the statute or have acted in bad faith. It is not good ground of objection to the proceedings that there are other places as well adapted to the purposes of the tunnel as the route selected.

The fact that petitioners actually constructed the tunnel before beginning the proceedings to condemn, cannot affect their right of condemnation. This right of way may be taken through other mining claims, when necessary. They are not such public uses as are exempt from condemnation.

Ohio. *Miami Coal Co. v. Wigton*, 19, 560 (1869). An act conferring on mining corporations the right to build railroads from their mines to other railroads, and providing that in respect thereto they shall be subject to and governed by certain acts in relation to railroads, does not confer the right of eminent domain given to railroads by those acts.

Pennsylvania. *Harvey v. Thomas*, 10 Watts, 63 (1840). A., being the owner of a coal mine, proceeded, under the act of May 5, 1832, to ascertain the amount of damages which B. would sustain by reason of the location of a railroad across his lands; and the matter was proceeded in, so that a verdict was rendered for the amount of damages in favor of B. A. then entered upon the land of B., and made the road before a judgment was entered on the verdict. *Hill*, that though the proceedings thus had by A. did not furnish a justification of the trespass, yet they protected him from vindictive damages.

¹ Gen. Stats. 256-273.

Neeld's Road, 1, 353 (1845). A report of viewers appointed, under the act of April 16, 1838, sec. 19, P. L. 642, was set aside because it laid out the road in part on a public road, and because notice was not given of the proceedings to interested parties.

"The act of April 16, 1838, is crude and imperfect, and can only be carried into effect by adding it to our road system and treating it as if it were a section in the general road law." Burnside, J.¹

Harvey v. Lloyd, 8, 331 (1846). In proceedings to open a railroad from mines to the public works, a petition, signed by the lessee and agent of the owners of the mines on their behalf, is sufficient.

The necessity for such a railroad within the act of Assembly is not an absolute but a reasonable necessity, and may exist though a road might, at great expense, be constructed over the petitioner's land. Whether it is necessary and useful, is for the jury. It may commence at a point on, and extending over the twenty feet occupied by, the railroad of another, he not objecting, and terminate within one hundred feet of that road, on the same public canal. "The argument of the defendant, that the act of Assembly authorizes the taking of the land of one, and giving it to another, is a perfect fallacy. All that the act does, is the giving of one the right of way over the land of another, for a special purpose, after making full compensation."

Shoenberger v. Mulhollan, 8, 134 (1848). The petitioners, who in their original petition stated that they were the owners, gave evidence that they were in possession of the coal bank and adjacent land, and had built a house thereon, which was actually occupied. This was a good, equitable title, subject to all the incidents of a legal estate, and gave the owners a right to build a lateral railroad, under the act of 1832, to their coal mines.

Hays v. Risher, 32, 169 (1858). Under the Lateral Railroad Law of May 25, 1832, the viewers, and, in case of appeal, the court and jury, are to decide whether the proposed road is necessary and useful for public or private purposes, and to assess the damages of the intervening owner; but they have nothing to do with the location of the road, — that is to be done by the petitioner on his responsibility.

"The truth is, when a lateral railroad is laid upon intervening lands, private property is not taken for *private* use, and there is no occasion for Judge Gibson's remark in *Harvey v. Thomas*, 10 Watts, 63, that the constitution does not forbid such taking. The private property is taken for public use — for clear and definite objects of a public nature which are of sufficient importance to attract the sanction of the sovereign. That an individual expects to gain thereby, and has private motives for risking the whole of the necessary investment, and acquires peculiar rights in the work, detracts not a whit from the public aspects of it. The same thing can be said of every railway corporation and of almost every public enterprise." Woodward, J.

Horner & Roberts's Lateral R. R., 37, 333 (1860). The acts of April 24, 1843, and June 6, 1848, by which persons proceeding to procure the right to make a lateral railroad may acquire wharves and landings are part of one system with the act of 1832. They are to be

¹ Harding, P. J., in *Waddell's Ap.*, 84 Pa. 90, said that it has since been thus treated uniformly.

construed as one. In proceedings to obtain wharves and landings, an appeal lies from the action of the viewers, but the only question to be tried on that appeal is the amount of the compensation. The jury cannot pass on the question of necessity and location.

Brown v. Peterson, 40, 373 (1861). Under the act of 1832, and its supplement of April 20, 1858, the determination of the necessity of the proposed road, after an appeal from a favorable report of viewers, is exclusively for the courts, and is not to be submitted to the jury for retrial; the only question for them is the amount of damages.

Boyd v. Negley, 40, 377 (1861). In proceedings under the Lateral Railroad Acts it is not essential, though proper, that all the owners of land over which the proposed railroad is to pass should be named in the petition; and if a mistake be made as to the real owner, the court may direct the damages assessed by the viewers to be paid to the proper party, on proof of the facts.

Where one was named as a reputed joint owner of a tract over which the railroad was located in connection with the real owners, when she was not a joint owner, but only had an annuity issuing out of the land, and her name was stricken from the record by leave of the court, after the report of the viewers and before the final assessment of the damages, it is not a fatal defect in the petition or proceedings. The owners of the land were named, and they could show that the proposed road was unnecessary, or failing in that could have their damages assessed, which was all they were entitled to under the law; nor were they compelled to appeal in order to prevent her participation in the damages, for the assessment was not an adjudication between them, and if it had been, it is no ground for reversing the action of the court below, where the damages had been assessed for the rightful owners; nor can they complain that their tenant was not named in the petition, for such omission was not a defect therein.

It is not a valid objection to the petition that it represented the desire of the petitioner to make, construct and use his proposed railroad with double or single track, as may be found most suitable for carrying his coal or coal of other parties thereon; for the law not only authorizes such a petition, but the owner of a lateral railroad may be required to carry the coal of other parties upon it.

It is not necessary that the grades of the road should appear in the petition or on the plat. If the petitioner already has the right of way sought, by another route, that fact is proper evidence to submit to the viewers or to the court below on the necessity of the road; but it has nothing to do with the question of damages, and is not evidence for the appellate jury.

It is not error in the court to permit the petitioner, pending an appeal as to damages, to amend his petition, so as to include other coal lands purchased since the commencement of the proceedings, as the amendments could not change or affect the matter in controversy between the parties.

Under the supplementary act of April 20, 1858, the question of the necessity of the road is wholly with the viewers and the court; the appellate jury can only pass upon the question of damages.

Before an appeal from the report of viewers of a proposed lateral

railroad is sent to an appellate jury for trial, the court should approve or disapprove the finding of the viewers respecting its necessity; for if the court does not concur in opinion with the viewers, there is nothing to be tried.

Brown v. Corey, 43, 495 (1862). Proceedings may be had against the owner of a stratum of coal, as contradistinguished from the proprietor of the surface, to obtain from him an underground right of way.

An entry on another's land to build or use a lateral railroad is an entry under the State, exercising the right of eminent domain, and in pursuance of public law; and all private contracts are subordinate thereto.

"If the Lateral Railroad Law had not been, long ago, rescued from this reproach, it had been condemned, long ago, as unconstitutional. It was founded in the experience of a great public want, and was passed for public purposes. Was not the development of our mineral resources a public object? Was it not a great public interest to augment the tonnage of canals and railroads, which had cost the State many millions to construct? The man whose minerals lay within three miles of a State canal, but could get them into it only by crossing the intervening land of an unneighborly owner, had been taxed as well as his forward neighbor to build that canal—was it not reasonable and just to give him not a private, but a public way, he paying all damages he should occasion? Nobody will doubt the State might enter and build a railroad on his land—it is equally clear that the State might delegate her right of eminent domain to a corporation or an individual. But then the entry is under the State and in pursuance of public law. No covenants or private contracts between citizens can possibly be violated in such a case, because none can stand in the way of State authority. It is a resumption by the sovereign of a clear right of sovereignty, in subordination to which the covenants of the deed were made. Had the parties contracted expressly against the exercise of this right, they could not have bound the sovereign—much less can their covenants, made for other purposes, be permitted to have the effect claimed for them."

The measure of damages in such case is the injury done to the tract as a whole, or the difference between its value at the time of the entry and its value after the completion of the railroad.

Lyon v. Gormley, 53, 261 (1866). The Lateral Railway Act of May 5, 1832, "was intended to give the petitioner nothing more than a privilege to open, construct, complete and use a railway through the lands of another. The owner of the land is not divested of his right to the freehold, nor of his title to the stone, wood or minerals. The act fastens upon his land a servitude; but it does not disturb any right or ownership not essential to that servitude." The petitioner does not acquire the ownership of the materials which he may excavate, and having dug out coal in constructing his underground way, and having sold the same, he is liable in trover to the owner of the land.

Keeling v. Griffin, 56, 305 (1867). The act of March 29, 1840, is a supplement to the act of May 5, 1832, is *in pari materia* with it, and should be so construed. Neither act authorizes the connection of a lateral road, except with a public improvement, railroad, or highway,

as enumerated in those acts. "It must be admitted that the act of May 5, 1832, the first act in this State giving authority to private or unincorporated persons to exercise the right of eminent domain, and take private property for the purpose of constructing lateral railways to connect with public highways, was very narrowly within constitutional sanction; and had it not been for provisions contained in it, that the public might use such roads when made, on conforming to certain regulations and paying tolls, together with the reserved right of the State to take such improvements at any time on reimbursing the cost of construction, the act never could have been sustained, as I think is shown in the opinion of Woodward, J., in *Hays v. Risher*, 8 Casey, 169. The constitutionality of the act and its supplements, however, has been affirmed in numerous cases on these and other grounds, and is not now an open question."

Hays v. Briggs, 74, 378 (1873). If the petitioner is dissatisfied with the extent of the allotment by the viewers, he should file exceptions; on an appeal by the land-owner, the jury can allot less but not more than the viewers. The appeal under the act of Nov. 17, 1871, is confined to the assessment of damages, the necessity for a landing for petitioner, and the necessity of the owner to retain the land for his own use. The "landing" contemplated is for loading and unloading boats, not for a harbor for them, whether empty or laden. A lateral railway may be constructed to a river over an intervening railroad. A landing cannot be taken under the act of 1871, if the owner requires and in good faith intends to use the land for his own purposes, whether presently or in the future.

Waddell's Ap., 84, 90 (1877). The act of June 13, 1874, which gives to persons owning anthracite coal lying on both sides of any river a right of way across or under the same, is unconstitutional. It takes private property for private use.

It authorizes a private road connected with no highway or place of necessary public resort, one which the public has no implied right or license to use.

Salt Co. v. Brown, 7, 191 (1874). A corporation owning coal lands having made application to obtain a subterranean right of way through the lands of another person under secs. 41 and 45, ch. 43, of the Code,¹ it appeared that the coal could not be mined and transported without going through defendant's land; that the company used the coal in their salt works and to sell to the people in and about the town of H., who could also obtain it from other sources; that the public would not use the subterranean way desired, but only the company.

It was accordingly held that the purpose of the way was not of public utility, and the right could not be acquired.

III. TIMBER RIGHTS.

At common law the mere right to mine, to extract, and remove the minerals from land gave no right to use or consume the timber upon that land, except in the case of tenants for life, who were

¹ This statute is no longer in force. See Code of 1891, chaps. 42 and 43.

working open mines, or a tenant for years with a right to mine. Of course, if the removal of the timber were necessary in order to reach the minerals, it might be removed, but its use was not an implied right of the mine owner.

But the license to mine on the public lands which prior to 1866 was assumed to exist, carried with it as incidental the right to use wood from the public domain,¹ and the mining statutes subsequently passed by Congress, were construed to give the occupant of mining ground on the public domain the right to cut and remove so much of the timber thereon as was necessary to the actual working of the claim. For such cutting of timber he was not subjected to the penalties of Rev. Stats. 2461.

The rights of miners to cut and use timber of the public domain² are now defined by two statutes of June 3, 1878, chaps. 150 and 151 (20 Stat. 88, 89). The first of these is as follows: --

"That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts, of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, the provisions of this act shall not extend to railroad corporations.

"Sec. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact. And all necessary expenses incurred

¹ *Tarter v. Spring Creek W. & M. Co.*, 5 Cal. 395; *Rogers v. Soggs*, 22 Cal. 444.

² The right to cut timber on State land is given to miners in Wyoming by act of March 4, 1897, c. 77.

in making such proper examination shall be paid and allowed such register and receiver in making up their next quarterly accounts.

"Sec. 3. Any person or persons who shall violate the provisions of this act, or any rules or regulation in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months."

The second act, as amended by the act of Aug. 4, 1892, provides for the sale of timber lands in all the public land States, and in its fourth section prescribes a penalty for cutting timber on the public lands: "*Provided*, that nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States, and the penalties herein provided shall not take effect until ninety days after the passage of this act."

The first of these acts applies only to the States and Territories enumerated, having no application to California and Oregon. This, at least, is the position of the Circuit Courts in those States, though contrary to the previous decision of the Land Department. The miner may have all the timber he may need to make the working of his claim possible. Its use in quartz mills and reduction works and for tramways is use for mining purposes. The provision for the enactment of rules by the Interior Department has been decided in Montana not to be unconstitutional.¹ When the United States bring an action to recover a penalty under the third section, it is not necessary for them to negative every possible fact or circumstance that would justify the defendant in taking the timber. It is sufficient to show that the defendant took timber from the public domain, and the justification of the act must appear as a defence. *Prima facie* one taking timber from the public lands is a trespasser, and he must prove the facts necessary to bring himself within the provisions of the act. A defence to an action for a penalty under the second act must show that the timber in question was cut upon the defendant's claim in the ordinary course of working the same (or farming as

¹ See, however, *United States v. Eaton*, 144 U. S. 677: *In re Kollock*, 165 U. S. 526.

the case might be), or was taken from the public lands for the necessary improvements thereon. And this defence must rest upon a *bona fide* mining operation, not upon one which is a mere pretext to cover speculation in timber. Whether it is such is a question of fact to be determined by the circumstances of the case.

The owner of a mining claim has the right to the timber thereon, and must protect it from trespassers. He cannot look to the government to bring suit for him. But the removal of the timber is not such an irremediable injury as will be restrained by injunction. It does not destroy or injure the estate in its mineral character, but only affects the cost of fuel.

The rules and regulations prescribed by the Secretary of the Interior, by virtue of the power given him by the first of the above acts, are as follows (5 L. D. 129, Circular of Aug. 5, 1886): —

“ 1st. The act applies only to the States of Colorado and Nevada, and to the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana, and other mineral districts of the United States not specially provided for.

“ 2d. The land from which timber is felled or removed under the provisions of the act, must be known to be of a strictly mineral character, and that it is ‘ not subject to entry under existing laws of the United States, except for mineral entry.’

“ 3d. No person, not a citizen, or *bona fide* resident of a State, Territory, or other mineral district provided for in said act, is permitted to fell or remove timber from mineral lands therein. And no person, firm, or corporation felling or removing timber under this act shall sell or dispose of the same, or the lumber manufactured therefrom, to any other than citizens and *bona fide* residents of the State or Territory where such timber is cut, nor for any other purpose than for the legitimate use of said purchaser for the purposes mentioned in said act.

“ 4th. Every owner or manager of a saw mill, or other person felling or removing timber under the provisions of this act, shall keep a record of all timber so cut or removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of

lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purpose for which sold, and shall not sell or dispose of such timber, or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for buiding, agricultural, mining, or other domestic purposes within the State or Territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchases such timber or lumber exclusively for his own use and for the purposes aforesaid.

"5th. The books, files, and records of all millmen or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this Department.

"6th. Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes, within the State or Territory where it grew. All cutting of such timber for use outside of the State or Territory where the same is cut, and all removals thereof outside of the State or Territory where it is cut, are forbidden.

"7th. No person will be permitted to fell or remove any growing trees of any kind whatsoever less than eight inches in diameter.

"8th. Persons felling or removing timber from public mineral lands of the United States must utilize all of each tree cut that can be profitably used, and must cut and remove the tops and brush, or dispose of the same in such manner as to prevent the spread of forest fires. The act under which these rules and regulations were prescribed provides as follows:—

"Sec. 3." [As above.]

"9th. These rules and regulations shall take effect Sept. 1, 1886, and all existing rules and regulations heretofore prescribed under said act, inconsistent herewith, are hereby revoked."¹

United States. *United States v. Nelson*, 5 Sawy. 68 (1878), D. C. D. Oreg. Rev. Stats. 2461, which prohibits absolutely, under penalty, the cutting or removal of any timber from the public lands for any purpose except the use of the Navy, is repealed by the pre-emption, homestead, and mining laws of subsequent date, so far

¹ See also Circular of Feb. 6, 1892, pp. 360; and Act Feb. 20, 1896, c. 28, § Supp. 35, 89, and Circular Oct. 12, 1892, 15 L. D. Rev. Stats. 447.

as its enforcement would interfere with the rights and powers created by those acts.

The occupant of mining ground on the public domain may cut and remove the timber therefrom as incidental to and in aid of his right to mine thereon. He may not use his location of a mining claim as a cover to speculate in timber, and is consequently limited to the use of such as is necessary to the actual working of his claim. Whether the cutting of the timber is merely incidental to a *bona fide* mining operation, or a mining operation is a mere pretext for the taking of the timber, is a question of fact to be determined from the circumstances of each case.

A special verdict found that the defendant had located seventy acres of public land as mining ground, and cut timber from four acres in advance of mining operations and disposed of the same for his own benefit, assigning as a reason that by cutting the timber in advance the stumps would rot and be more easily removed. This was held not to be necessary to the mining operation, and was within the penalty of Rev. Stats. 2461.

United States v. Smith, 8 Sawy. 100; s. c. 11 Fed. 487 (1882), C. C. D. Oreg. The act of June 3, 1878 (ch. 150, 20 Stat. 88), giving permission to the residents of Colorado, Nevada, the Territories, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral land therein, does not apply to Oregon, but the subject of cutting timber on the public lands within such State is regulated by the act of the same date (ch. 151, 20 Stat. 89), providing, among other things, for the sale of timber lands therein. "The use of it ['mineral district'] in the United States statutes is new and confined to this act. As a matter of fact, so far as appears, there is no section of the State known and defined as the mineral district. Being neither known in law or fact as the designation of any well defined or exact locality, it is as void in meaning and incapable of application as the phrase 'tree district,' 'stone district.' The title of the act does not contain the phrase, but limits its operation to the citizens of Colorado and the Territories; and it is not probable that there was any thought in the mind of Congress of extending it any further." It cannot be construed to be the equivalent of either of the well known expressions, "mining districts" or "mineral lands."

"Under the second act a defence to an action for unlawfully cutting timber on the public lands in this State must show that it was cut upon the mining or farming claim or land of the defendant in the ordinary course of working the same or preparing it for tillage, as the case may be, or was taken from the public lands for the necessary improvements thereon."

United States v. Benjamin, 21 Fed. 285 (1884), C. C. D. Cal.; *United States v. Smith* followed. The act of June 3, 1878, ch. 150, has no application to California, timber upon minerals lands in that State being protected and governed by act June 3, 1878, ch. 151.

United States v. Richmond M. Co., 40 Fed. 415, C. C. D. Nev. (1889). The defendant, a corporation engaged in mining, reducing ores, and refining bullion, purchased wood and charcoal for use at its reduction

works. The cord-wood and the wood from which the charcoal was manufactured were cut upon unsurveyed public lands, mineral in character, of little or no value except for the mineral therein, and within organized mining districts or not far remote from known mines.

Held, that this was mineral land within the meaning of the act of Congress of June 3, 1878, permitting timber to be taken therefrom for building, agricultural, mining, or other domestic purposes, and that defendant could lawfully purchase such wood and coal for said uses under the license given by that act; and the United States could not recover in an action of replevin therefor.

Northern Pac. R. Co. v. Lewis, 162, 366 (1896). One cutting timber upon the public domain is *prima facie* a trespasser, and the burden is on him to show that he comes within the provisions of the act of June 3, 1878. The presumption, in the absence of evidence, is that the cutting is unlawful.

Colorado. McFeters v. Pierson, 15, 201 (1890). A person having possessory title may maintain an ordinary civil action against a trespasser; and such action lies for injury to (as by cutting and carrying off) timber as well as to the minerals themselves.

Montana. United States v. Williams, 12 Pac. 851 (1887). The provision of the act authorizing the Secretary of the Interior to make regulations relative to the cutting of timber is constitutional. No one has a right independently of the statutes to cut timber on the public land. The statute is a license to certain persons to do so for certain purposes, and the restriction of this license by regulations of the Interior Department is not a delegation of legislative powers.

The courts of the Territory of Montana take judicial notice of these regulations, a statute of that Territory (Rev. Stats., div. 1, sec. 625) requiring courts to take judicial notice of public and private acts of the executive departments of the United States.

In an action by the United States to recover the value of wood cut upon the public lands it is sufficient to allege that a certain amount of timber had been cut by the defendant on the public lands, and the value thereof. It is not necessary to negative in the complaint every possible fact or circumstance by which the defendant might be justified in taking the timber.

Heaney v. Butte & Mont. Com. Co., 10, 590 (1891). An injunction will not issue to restrain a trespasser from removing trees from a limestone mining claim, upon the owner's averments that he intends to work it and that the trees are necessary for fuel, which is scarce and difficult to obtain by reason of remoteness from a railroad, when it is not shown that the trespasser is insolvent and unable to respond in damages. There is an adequate remedy at law, and the injury is not irremediable. The removal of the timber will not destroy or injure the estate in the character in which it is enjoyed, but will only increase the cost of fuel.

Pennsylvania. Neel v. Neel, 19, 323 (1852). A tenant for life may take timber from the land for use in his operations in mining from open mines.

Tennessee. Wilson v. Smith, 5 Yerg. 379 (1825). A tenant who has leased a lead mine, with liberty to smelt ore, is entitled to use so much timber as may be necessary for that purpose. To use more than is necessary is waste.

Virginia. *Findlay v. Smith*, 6 Munf. 134 (1818). The tenant for life of land containing a salt well, and having upon it salt works, has a right to an unlimited use of the wood thereon for fuel to carry on the works.

LAND OFFICE DECISIONS.

A tunnel owner has a right to timber growing on a tunnel site, so long as he complies with the law in running his tunnel. *Copp*, 222 (1878).

By the act of June 3, 1878, timber may be cut upon the mineral lands of the United States for sale within the State or Territory where cut, but not for transportation beyond the boundaries thereof.

The use of wood in quartz mills and reduction works in the mineral regions is a use for mining purposes. *Frank P. Hardin*, 1 L. D. 597 (1882).

The object of the act of June 3, 1878 (ch. 150) was to enable the inhabitants of the States and Territories referred to, to cut and remove timber from the class of public lands withheld from the operation of the pre-emption and homestead laws. If mineral districts are found outside of the States named, they are also included in the provisions of the act.

The land to be sold in California, Nevada, and Washington Territory, under chapter 151, is non-mineral land.

The mineral lands are excluded. The object was to enable the inhabitants to purchase certain timber lands, and to prevent waste upon the public lands, the miner and agriculturist being permitted to cut timber in clearing for tillage and improving mines, as prescribed in the act.

"If the rights saved to the miner and agriculturist by the proviso of section 4 were intended to apply only to such land as they claimed, the words 'or from taking timber necessary to support his improvements' are useless. The words were not happily chosen, and it may be somewhat difficult to say what is intended by the words 'to support his improvements.' If applied to a miner it must, I think, be intended to mean all the timber he might need to make the working of his mine possible, and if a farmer or agriculturist, all the timber he might need for the use of such farm. If the timber he uses is only such as he needs 'to support his improvements,' I consider it immaterial whether he cuts it himself or whether he purchases it of one who cuts it for that purpose, and if it becomes necessary for a miner or agriculturist to have timber 'to support his improvements,' and his neighbor cuts it for him, I think such neighbor is as fully protected by the proviso as if he had cut it for the purpose of supplying his *own* improvements." *Instructions*, 1 L. D. 600 (1882).

Timber may be taken from mineral lands to be applied solely to the purposes specified in the act of June 3, 1878, *i. e.* mining and domestic purposes; but none less than eight inches in diameter may be cut.

Timber may be taken from near public mineral lands by miners and agriculturists, for improvements of their mines and farms, when their respective claims do not furnish the necessary quantity; but not for their private gain or for commercial purposes. 1 L. D. 602 (1883).

If a mill site is timbered, the lawful claimant may cut and remove the timber thereon for the purpose of constructing a mill, reduction works, tramways, or other accessory required in the development of his mining interests. *A. B. Page*, 1 L. D. 614 (1883).

The locators of mining claims, being invested by Congress with "the exclusive right of possession and enjoyment of all the surface included within the lines of their location," have a property therein capable of protection in the courts. They must care for their own. If a stranger trespasses by cutting and using timber, the locator must protect himself. He cannot look to the government to bring suit. *Lewis Smith*, 1 L. D. 615 (1882).

"All other mineral districts," etc. (act of June 3, 1878), include the mineral districts of California,¹ and all privileges under chapter 150 to fell timber for mining, agricultural, and domestic purposes attach to citizens and residents of those districts.

In addition to the privileges conferred on citizens and residents, under chapter 150, the miner and agriculturist within the mineral districts of California are permitted, under section 4 of chapter 151, to go upon the non-mineral public lands to procure such timber as they may respectively need for use in the development of their mining claims or for the improvement of their farms, should there not be upon their respective claims or farms a sufficient amount of timber for the uses and purposes specified. In the procurement of such timber from the non-mineral lands they are restricted to the cutting and removing of such timber only as may be actually required for the development and improvement of their particular claims and farms, or they may employ others to procure such timber for them, provided such persons engaged or employed in supplying such timber to the parties lawfully authorized to use the same for the purposes indicated, shall not, under color of such employment, engage in cutting or removing any timber from the public lands for their own private gain or for commercial speculation. 1 L. D. 616 (1882).

The cutting or removing of timber from mineral lands is permitted for the following purposes, viz. mining, agricultural, and domestic purposes, but not for exportation from the State or Territory where cut; also the cutting and removing of timber from non-mineral public lands is only allowed when the material is used in the actual development or improvement of the mine or farm of the particular person for whom the cutting or removing is done. *P. D. Hurlbut*, 1 L. D. 618 (1882).

Where coal suitable for fuel exists in the neighborhood, timber needed for use in the mines near by should not be cut from the public land as an article of fuel. *H. M. Gregg*, 2 L. D. 827 (1883).

Coal lands are not mineral lands within the meaning of the act of June 3, 1878, authorizing the felling of timber upon lands in Colorado, Nevada, and the Territories for mining and domestic purposes.

"It will be observed that the act referred to is restricted in its operations to lands subject to entry under the mining laws, and that it is the character of the entry by which they may be appropriated, and not the character of the lands themselves, that determine the question as to whether timber may be cut therefrom under the provisions of said act for mining and domestic purposes." 2 L. D. 827 (1884).

¹ *Contra, United States v. Benjamin*, 21 Fed. 285, *ante*.

IV. TAILINGS AND REFUSE.

A. *Property therein and their Deposit on the Land.*

At common law the mine owner is bound to dispose of his refuse so as not to injure others; he may not deposit it on the lands of others, but must deposit it on his own land, or on the surface land beneath which his mines lie. Where the minerals are owned by one person and the soil by another, the former has a right to deposit his refuse upon the surface. This right is limited to the refuse of the mines beneath the particular surface estate, but it may, by the terms of the conveyance or contract, be enlarged to include that from adjoining mines. But he must make the deposit in such manner as to occasion the least possible damage to the surface.

The mine owner is subject to the further obligation to make the deposit on his own land in such a manner that the refuse will not by the ordinary action of nature be carried upon the land of others. Where the refuse is liquid, as in the case of oil wells, the disposal of it is governed by the rules stated in the next subdivision¹ in regard to the pollution of streams.

A different rule from that at common law seems to have prevailed in those Western States where placer and hydraulic mining are carried on extensively. It was early held in California that a miner might appropriate a dumping ground of the public domain if he did not interfere with pre-existing rights. This land might subsequently be located as mining ground subject to the prior right of deposit, but not, however, to a subsequent one. The right to the use of such dumping ground may be lost by adverse possession. But even a prior locator must work his claim with reasonable care. In so doing he may, by the discharge of his tailings, do some necessary injury to subsequent locators on lower ground for which he will not be liable, provided he does not thereby destroy the value of the latter claims or prevent the mining of them. But he may not let his tailings unrestrained run down a natural channel, without regard to the damage they may do. A custom to do so will not justify it. In Colorado this subject is regulated by statute,² by which it is made the duty of every miner to take care of his own tailings

¹ Page 613, *post*.

² M. A. S. 3144.

on his own property, or become responsible for all damages that may arise therefrom.

The measure of damages for depositing refuse on the ground of another is the cost of removal, but no larger amount than the value of the lot can be recovered.

The tailings or refuse of a mine are the property of the mine owner. This property he may, however, abandon, either by casting the refuse away, or by suffering it to go where it will unobstructed. If it flow upon the land of another, he is entitled to it. When once abandoned, any one may appropriate it, provided it is not reclaimed before this appropriation. The original owner may reclaim it, though another with a view to its appropriation has incurred expense. The latter's right is contingent upon continued abandonment, and the owner is not obliged to continue the abandonment. Where tailings have been deposited upon public lands, which have no value except for such tailings, the land may be located as mineral land, a possessory title to it may be gained in the same way as to mineral lands, and the holder of such a title may recover damages against any one removing the tailings.

The obligation of a lessee as to tailings and refuse, and his property therein, are governed by the terms of his contract. As a lessee's right is generally to take mineral of specified kinds, he has, in the absence of provision to that effect, no right to tailings; these are the property of the owner. A covenant in a lease to remove all rubbish at the end of the term applies only to such as result from the operations during the lease.

In several of the States the right of eminent domain has been conferred upon mine owners to take rights of way for the purpose of conducting their tailings away from their mines, and even to take ground for places on which to dump their refuse.¹

A proceeding under the California statute was held unconstitutional as an attempt to take property for private uses.

California. *Jones v. Jackson*, 9, 237 (1858). The pay dirt, and tailings of a miner, which are the products of his labor, are his property. When a place of deposit for tailings is necessary to the working of a mine (as where the deposit is of such a character that the first washings only extract a portion of the gold), there can be no doubt of the miner's right to appropriate such ground as may be neces-

¹ California, Code Civ. Proc. 1238; 3142; Montana, Pol. Code 1895, secs. 3630-3631; Georgia, Code 1882, art. 7, secs. 742-743; Code Civ. Proc. 1895, sec. 2211; Utah, 753; Idaho, Rev. Stats. 1887, secs. 3130, Act March 12, 1890, c. 37.

sary for this purpose; provided he does not interfere with pre-existing rights. His intention to appropriate such ground must be clearly manifested by outward acts. Mere posting notices is not sufficient. He must claim the place of deposit as such or as a mining claim.

To suffer the tailings to flow where they list without obstructions to confine them within the proper limit, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to this rule. If no artificial obstruction is required to confine them within the proper limits, then notice is necessary. If a miner allows his tailings to mingle with those of other miners, this does not give a stranger a right to the mixed mass. Where tailings are allowed to flow upon the claim of another, he is entitled to them.

O'Keiffe v. Cunningham, 9, 589 (1858). One party may locate ground in a mineral district for fluming purposes, and another may at the same or another time locate the ground for mining purposes. The locations, being for different purposes, will not conflict. A party may locate a claim for mining purposes on land which has been and still is used as a place of deposit for tailings by another. His mining right will be subject to this prior right of deposit, but not to that of a third party, who subsequently attempts to use the land as a place of deposit for his tailings.

Esmond v. Chew, 15, 137 (1860). The owner of mining claims situated in the bed of a cañon has not the right to build a flume and deposit tailings upon the claim of another subsequently located below him, on the ground of necessity.

It was error for the court below to charge "that a person first locating a mining claim in the bed of a stream is entitled to the channel below as an outlet, and that when such outlet from the usual mining operations above becomes obstructed he may open the same, and if he can do so by no other means, may construct a flume down the channel as far as necessary, and as far as the same can be constructed without considerable damages to the claims subsequently located."

Logan v. Driscoll, 19, 623 (1862). Plaintiffs owned mining claims in the bed of a creek, defendants owned claims upon the hill above, in working which they caused large quantities of rock and earth to rush down the hill by the force of the water which they used, covering up and destroying the plaintiffs' works, and rendering it impossible for them to use their claims.

It was not error to charge that a subsequent locator had no right to so work and use his claim as to deprive a prior locator of the use of his claim, that such a use was unreasonable, and in such a case the rule of first in time, first in right, applied. Plaintiff being the prior locator, was entitled to damages and an injunction.

Dougherty v. Creary, 30, 290 (1866). If miners engaged in washing their claims with water abandon the water and tailings which pass from their mining grounds, any other persons have a right to take and appropriate the same to their own use, but their right is contingent on the fact of continued abandonment. It does not become obligatory on the persons abandoning to continue to do so, even though other persons, encouraged by the circumstance of abandonment for a time, have incurred the expense of constructing flumes to use the abandoned water and tailings.

Gregory v. Harris, 43, 38 (1872). A party mining upon a ravine which runs into another ravine is not clothed by virtue of his right to use the ravine upon which he is mining as an outlet for his tailings, with the general right to break in at any point he may select upon the tail-race of another constructed in the other ravine, and to discharge his tailings therein.

Consolidated Channel Co. v. C. P. R. Co., 51, 269 (1876). Code Civil Proc., sec. 1238, subd. 5, provides for the exercise of the right of eminent domain in behalf of "tunnels, ditches, flumes, pipes, and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from the mines." A mining company sought to have land of a railroad condemned under this act for the purpose of building a flume and having a place to dump tailings. A demurrer to the complaint was sustained on the ground that the proceeding was unconstitutional, as taking property for private uses.

McLaughlin v. Del Re, 16 Pac. 881 (1886). In an action to recover damages for dumping tailings upon plaintiff's land, and for an injunction to restrain a continuance of such injury, a judgment for the plaintiff is supported by the finding that the plaintiff had for more than ten years been in open, notorious, exclusive, and adverse possession of the land, though it was originally claimed for a dumping ground, under miners' regulations, by the defendant's grantors.

Fuller v. Swan River Min. Co., 12, 12 (1888). Under **Colorado**. M. A. S., 3144, miners must take care of their tailings on their own property. Evidence of a custom to dump their tailings on their own ground, and let them take care of themselves, is insufficient to prevent the issuing of an injunction against the washing of tailings upon plaintiff's claim. Nothing but plaintiff's consent will excuse this act.

Ralston v. Plowman, 1, 595 (1875). Plaintiff built a flume, through which he discharged his tailings on the ground of defendant, who was a prior locator. The latter built a flume entirely on his own ground, and his tailings filled up the plaintiff's flume. *Held*, plaintiff has no right of action, so long as he was not prevented from dumping on his own ground.

McGoon v. Ankeny, 11, 558 (1850). One who having made slag, and considering it worthless, casts it away with the intention of abandoning it, thereby divests himself of the title, and any person may appropriate it, the original owner having no more right to complain than if he had never owned it, unless he reclaimed it without violating the rights of others, and before its appropriation by others.

Coppinger v. Armstrong, 5 Ap. 637 (1880). A covenant by the lessee in a lease of land with the right to use rock and burn lime, that all rubbish and spawls should be removed at the expiration of the term, is binding on the assignee of the lease.

Coppinger v. Armstrong, 8 Ap. 210 (1881). But this covenant does not apply to rubbish and spawls on the premises at the execution of the lease, but only such as result from the operations under the lease.

Montana. *Lincoln v. Rodgers*, 1, 217 (1870). A custom by which those holding mining claims in a gulch may let their tailings run down the natural channel without cribbing the same, without regard to the damage done to those having claims below, cannot be sustained. In an action for damages for washing down tailings on plaintiff's claim, whereby it was rendered valueless, such a custom is no defence. The defendants in working their claims with reasonable care, under prior locations, might do some necessary injury to plaintiffs which would be *damnum absque injuria*. "But a mining custom which would allow the total destruction of a junior locator's mining operations, in a gulch below prior locators, on ground which was vacant, cannot be maintained under any statute or any common mining law with which we are acquainted."

"Where persons locate ground for the purpose of constructing a flume, they can locate any number of feet, not in violation of the mining regulations of the district, and, if there are no regulations, not exceeding a reasonable amount for the deposit of tailings or dump; but the boundaries of the same must be marked in accordance with the regulations of the district, or, if there are none, by fixing the boundaries by such physical marks as will advertise the precise ground claimed for mining and dump, so that those wishing to locate thereafter may know what is vacant."

Nelson v. O'Neal, 1, 284 (1871). It is not an abuse of discretion for a court to refuse to enjoin parties from building a dam upon their mining ground to prevent tailings from injuring their property. Miners are entitled to the free use of the channel of a creek so that water will flow from their own ground, but they have no right to fill the channel with tailings that will flow down upon the claims of others.

Nevada. *Harvey v. Sides S. M. Co.*, 1, 539 (1865). Where the plaintiff claimed damages for the deposit of a dump pile from a quartz lode upon his building lot, and it was shown that the cost of removing the dump would be greater than the value of the premises, the measure of damages is limited by the value of the lot, although in ordinary cases the measure of damages would be the cost of removal.

Rogers v. Cooney, 7, 213 (1872). If land be of value only for tailings which have been washed down a stream and deposited upon it, and it is claimed for no other purpose, though not strictly mineral land, the acquisition of possessory title to it is governed by the same rules as such titles to mining claims.

A person who enters upon such land when vacant for the purpose of digging, hauling away, and milling the tailings, has a survey made and recorded, marks the boundaries with large posts, and continuously works the claim and builds a cabin on it for storing tools, can maintain trespass against an intruder entering his boundaries. His right to the tailings is coextensive with his right to the land, and he may recover for their removal.

New York. *Genet v. D. & H. Canal Co.*, 122, 505 (1890). Plaintiff "leased" to defendant "all the coal contained on, in, or under" a certain tract, and further granted rights of way for roads, ditches, and drains, "with the right to erect drains on the

surface for the proper mining of said coal," also the use of the land for digging air shafts, erecting necessary buildings, "together with lands for piling coal or culm, and all other appurtenances they may require for mining, etc., the coal to be mined under this agreement." And it was further agreed and understood that the defendant might "use and occupy the rights and privileges hereby granted and the openings, buildings, fixtures and appurtenances made and constructed by them for the mining, preparing and forwarding coal under this agreement, and for the mining, preparing and forwarding coal from any adjoining or contiguous lands, until all the lands that they desire to take coal from, and that can be mined and taken out through said openings, shafts and slopes, shall be exhausted."

The defendant was held to have the right to pile upon plaintiff's land the culm or refuse taken from the adjoining lands. This also included the right to drain water from the mines on the adjoining land to the shaft on plaintiff's land and thence to pump it out. The defendant had a right to unite its works on all the properties into one mine.

Erwin's Ap., 20 W. N. C. 278 (1887). A contract Pennsylvania. was made for the exclusive right to all the iron ore on a certain tract of land, with the right to wash on said premises such ore as should require washing; a certain royalty per ton to be paid for each ton of clean merchantable iron ore taken. For some time the refuse from the washing of the ore was allowed to accumulate in a dam, being considered of no value. Its utility for the manufacture of paint having been discovered, the lessees proposed to remove it, and the lessor filed a bill to restrain such removal. The testimony of experts and others was that, while containing iron ore and so classified by scientists, this refuse matter was commercially known as ochre. *Held*, that the iron ore intended by the contract was the iron ore at that time mined with a well known use and application, and that the crude ochre in the dam did not pass under the terms of the lease.

Doster v. Friedensville Zinc Co., 140, 147 (1891). A lease was granted "for the purpose of searching for minerals and fossil substances, and conducting mining and quarrying operations to any extent he might deem advisable," the lessee to pay forty cents per ton for all fine zinc ores, sulphurets of zinc, and iron ores, and to have the right to separate clean sulphuret ores from the rock and pay only for the clean ores; and in case any other than zinc ores were removed, they were to be paid for at the same rate. In the process of extracting the ore, the rock was crushed and washed, and the refuse, which contained 7.5 per cent of zinc ore, was treated as waste. Subsequently it was discovered that this material was valuable in the manufacture of paving blocks. It was held to be the property of the lessor, and the lessee having sold it, had to account for its price and was enjoined from further removal of it. The purpose of the lease was to deal only concerning ores.

Commonwealth v. Steimling, 156, 400 (1893). Where waste from mines is deposited upon the bank of a stream, and is washed down and deposited in the bed of the stream, having been abandoned by the original owner, it is the property of him who owns the bed of the stream at that point.

Lance v. Lehigh & Wilkesbarre Coal Co., 163, 84 (1894). See this case on page 134, *ante*, as to what "refuse or culm" includes under a covenant that this shall belong to the lessor of a coal mine.

B. *Pollution of Streams.*

When the refuse from mining operations is deposited, conducted, or allowed to find its way into watercourses, another set of principles and rules is brought into action to determine the rights and duties of the mine owner. He is then a riparian owner, with the rights and subject to the obligations of such a proprietor.

The general rule is that the owner of land over which flows an unnavigable stream, may use the water, but must return it to the stream so that it may descend to the land of the owners lower down the stream undiminished in quantity and unimpaired in quality, except so far as is necessary to the ordinary and natural use and enjoyment of his land. The natural use and enjoyment of mineral lands (that is, lands which are more valuable for the minerals they contain than for any other purpose) is mining in the ordinary and usual manner. Such pollution, therefore, of the stream as takes place by reason of mining upon its banks is *damnum absque injuria*, provided there is no deposit therein of matter whose accumulation upon the land is the result of artificial means. Water, although so impregnated with other substances as to render the stream absolutely unfit for domestic, agricultural, or manufacturing purposes, if its accumulation upon the land and in the mines is the result of natural forces, and not of human agencies, may be conducted into the streams which form the natural drainage of the land in which the mine is situated. Such a pollution of a stream might become a public nuisance if it was such as to involve the general health and well-being of the community,¹ but the mere personal inconvenience of a riparian owner must give way to the necessities of a great public industry. This rule does not, however, give to the miner the right to discharge into a stream accumulations of water which has been brought upon his land by artificial means, or such refuse as would not be naturally carried off the land by natural drainage. If sand, mud, and refuse of a similar kind are deposited in the stream by him, and they are carried down upon the property of the lower owners, he is liable to them for such injury as may be caused

¹ See *Comm. v. Russell*, 172 Pa. 506, *post*.

thereby. The rule that a man must so use his property as not to injure that of others, prevails in such a case. He must, as was said above, take care of his refuse upon his own ground, and he has no more right to discharge it upon the land of another through the agency of a natural stream than he has to throw it directly thereon. If the mine owner deposits his refuse upon his land so that every ordinary flood carries it into the stream, he is liable for the injury caused thereby. He must guard against such floods, and place the refuse of the mine where it cannot be carried off by them. If he does this, an extraordinary flood will be treated as a *vis major*, and he will escape liability for damages caused by its carrying into the stream or upon the land of others the refuse which he has placed out of reach of ordinary floods and the natural current of the stream.

The mine owner's right is subject to the further modification that the damage which is inflicted upon others must be unavoidable in the proper use of the land. If he can prevent it at an expense that will not so detract from the purpose and benefit of mining as to substantially deprive him of the right to use his own property, he is bound to do so. And if he fail to fulfil his obligation, he is liable for the damages resulting from his failure.

The principal rule is dissented from in Ohio, where, however, the subject is disposed of by statute imposing a penalty on those mine owners who allow the pollution of streams by their refuse.¹

These principles are of especial importance in those States where hydraulic mining is carried on extensively. Here the mine owner, by flumes and aqueducts, brings upon his land water, by means of which he deposits in the watercourses of the country the very land itself, which being carried off is deposited upon the land of others and in the beds of navigable as well as unnavigable streams. Such acts are absolutely unlawful, and those who suffer damage therefrom have a cause of action against the mine owner. Hydraulic mining is, however, an industry of such importance that equity will not interfere with it to prevent injuries of this sort, unless there is shown to be a substantial injury. Where the operation is of any magnitude, the injuries are generally substantial, and even, as in the case of the Yuba and Feather Rivers and their tributaries, incalculable. They then become nuisances,

¹ Rev. Stats. 1890, sec. 6925, as amended by Act April 22, 1896, 92 O. L. 287. See also Virginia, Act Feb. 29, 1892, p. 759.

both public and private, subject to all the remedies for such at the suit of the State or of individuals. Equity will enjoin their continuance, though the effect be to prevent mining by the hydraulic system. The right to such a deposit of débris cannot be gained by prescription or custom. It does not follow, however, that hydraulic mining is unlawful,¹ and the sale of water to be used in that business will not be enjoined on the ground that it is to be so used and will work injury to others.

In an action for damages for pollution of water, it is no defence that the deterioration was caused by the combined acts of a large number of riparian owners, and that defendant's act alone did not materially affect the water. Nor will the fact that others polluted the water prevent the granting of an injunction, when it is not found as a fact whether defendant contributed materially to the pollution. But it has been held in Pennsylvania and Alabama that the defendant in such a case would not be liable in damages for the combined result of the action of all.

The grantor of land for mining purposes, with the right of discharging tailings through a stream, or by means thereof, upon other of his land, cannot complain of any injury which naturally results to him from the use of this right.

As to navigable waters, the riparian owner is without rights therein below low-water mark; but so also are all others except the State, and they are consequently without remedy against him for obstructing their use of the water. They may, however, hold him liable for depriving them of the advantages of location, if he fill the stream by dumping therein the refuse of his mines.

United States. *Atchison v. Peterson*, 20 Wall. 507 (1874), affirming s. c. 1 Mont. 561. Plaintiff, the prior appropriator of water of a stream, owned two ditches by which it supplied water to miners. Defendants owned mining claims fifteen miles farther up the stream, into which were washed the tailings from their operation. Plaintiff alleged that thereby its ditches were obstructed with sand and dirt, making it necessary to erect a guard and employ a man ten minutes every day to clean out the same. The evidence showed there was little sand in the plaintiff's first ditch, and the preponderance of evidence was that this was washed down naturally from the side of the hills, and that the sand in the second ditch was carried by a tributary of the stream flowing into it below the first ditch. Defendants being responsible, and the damage to plaintiff inappreciable in comparison

¹ Its legality is declared in California by Act March 24, 1893, p. 337.

with that which would result to defendants by the indefinite suspension of the work, an injunction was refused.

Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. 753 (1884), C. C. D. Cal. The Yuba River rises in the Sierra Nevada Mountains, and after flowing in a westerly direction about twelve miles across the plain after leaving the foot hills, joins the Feather. At the junction, within the angles of these two rivers, is situated the city of Marysville. The Feather thence runs about thirty miles and empties into the Sacramento. These three rivers were originally navigable for steamboats and other vessels for more than one hundred and fifty miles from the ocean, the Sacramento being navigable as far as Marysville for the largest sized steamers. The defendants had been for several years, and they were still, engaged in hydraulic mining, to a very great extent, in the Sierra Nevada Mountains, and had discharged and were discharging their mining débris, rocks, pebbles, gravel and sand, to a very large amount, into the head waters of the Yuba, whence it was carried down by the ordinary current and by floods into the lower portions of that stream, and into the Feather and Sacramento. The débris thus discharged had produced the following effects: It had filled up the natural channel of the Yuba above the level of its banks and of the surrounding country, and also of the Feather below the mouth of the Yuba, to the depth of fifteen feet or more. It had buried with sand and gravel and destroyed all the farms of the riparian owners on either side of the Yuba, over a space two miles wide and twelve miles long. It was only restrained from working a similar destruction to a much larger extent of farming country on both sides of these rivers, and from in like manner destroying or injuring the city of Marysville, by means of a system of levees, erected at great public and private expense by the property owners of the country and inhabitants of the city, which levees continually and yearly required to be enlarged and strengthened to keep pace with the increase in the mass of débris thus sent down, at a great annual expense, defrayed by means of special taxation. It had polluted the naturally clear water of these streams so as to render them wholly unfit to be used for any domestic or agricultural purposes by the adjacent proprietors. It had filled to a large extent, and was filling up the beds and narrowing the channels of these rivers and the navigable bays into which they flow, thereby lessening and injuring their navigability and impeding and endangering their navigation. All these effects had been constantly increasing during the past few years, and their still further increase was threatened by the continuance of the defendants' mining operations.

Complainant owned a block of houses in Marysville, and farm and wharf properties on the banks of the Feather River below Marysville.

"Unless the acts of the defendants complained of, in view of all their necessary consequences, are legal, unless they are authorized by some valid law, it does not appear to us to admit of doubt or discussion that the results of those acts heretofore developed, still existing and operating and certain to continue and increase in the future, as disclosed by the evidence and indicated by the preliminary statement of facts, constitute a grievous and far-reaching public nuisance most destructive

in its character, or, in the terse language of one of complainant's counsel, a nuisance 'destructive, continuous, increasing, and threatening to continue, increase and be still more destructive.' Nor can there be any doubt that the complainant has suffered, that he is still suffering, and that by the continuance of those acts he will continue to suffer, special injuries, peculiar to himself, of a character to entitle him to equitable relief. The nuisance is both public and private." "If to unlawfully bury and destroy one hundred and twenty-five acres of a private party's best land; to from time to time cause injury to his remaining lands and buildings, necessitating large expense for repairs, and to impose upon him annually an extraordinarily onerous tax for the purpose of strengthening and enlarging levees for the protection of that portion of his property still left him against the constantly augmenting dangers, as in the case of complainant, does not inflict a special injury peculiar to that party which entitles him to relief, then it would be difficult to say what kind of injury arising from a public nuisance would entitle a private party to relief at his own suit. The acts complained of, if unlawful, or in the language of the Code of California, 'if not done or maintained under the express authority of a statute,' completely fill the definition given by the Code of a public nuisance, and also one for which a private person injured by it may maintain an action." Code, secs. 3479, 3480, 3498. The acts complained of being a nuisance, can under the law of California be legalized only by a statute expressly authorizing them, and no such statute exists. As to the acts of Congress, no intention can be properly inferred from any of them to permit the destruction or injury of the navigable waters of the State, or of towns and cities, or property of riparian or adjacent owners along the watercourses of the State, navigable or otherwise. "As to non-navigable waters, Congress had nothing to do with them, beyond the rights of the United States as a riparian proprietor, which are the same as the rights of other riparian proprietors, except that it might itself limit the rights of purchasers from the government of lands owned by it, sold subsequent to the passage of the act under which such limited sales are made. It had no power whatever to enlarge the rights of the vendees of the United States as against rights already vested in prior purchasers." "They could not grant lands, and in the grant, or by statute or otherwise, impose an easement for the benefit of their grantees upon lands already owned in fee by private parties, unincumbered by easements or conditions of any kind, or authorize any other trespass upon or injury to such other lands. They could only deal with their own as other land proprietors deal with theirs." Instead of enlarging the rights of the government's grantees beyond its own rights, the acts of 1866, 1870, and 1872 have placed limitations, restrictions, and incumbrances on them. Rev. Stats. 2338 does not show an intent to authorize the filling up of the navigable rivers of the State. It has no relation to the regulation of commerce on navigable rivers, but refers only to the public lands of the United States. It adds nothing to the legislative power of the State as to private lands.

The direction contained in the River and Harbor Bill of 1880 to the Secretary of War to make an examination with a view to devising a

system to prevent further injury from the deposit of débris in the navigable waters of California, does not legalize that deposit. Nor is the mere failure to prohibit the commission of a nuisance an authorization of it.

Even if authority were found in any act of Congress, it would be without force, for the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of the State, except by express grant; the shores and soils of navigable rivers were originally reserved to the States, and new States have the same rights, sovereignty and jurisdiction over this subject as the original States, and Congress has no power to grant the soil of navigable rivers as public land.

The destruction of the navigability of a river is not a regulation of commerce.

Of the California statutes, subd. 5, sec. 1238, Code Civ. Proc., does not authorize the acts complained of, nor does the act of 1878, sec. 1, subd. 8, which sought to devise a plan to avert the injury caused by the débris from hydraulic mining. Besides, the acts of the defendants constitute a taking and damaging of complainant's land without compensation, and as such contravene the provisions of the Fourteenth Amendment and the constitution of California, and the legislature of the State cannot legalize them. They are also unlawful, because by their permission the police powers of the State would be "so abridged or construed as to permit corporations to conduct their business in such manner as to infringe the rights of individuals or the general well being of the State." Further, the sovereignty of the State over the soil of navigable rivers is inalienable, and it cannot authorize them to be filled up with débris to the destruction of the public easement, the right of navigation. The admission of California into the Union was upon the express condition that "all the navigable waters within the said State shall be common highways, and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor." This is a valid act of Congress under its power to regulate commerce which the State may not violate.

The right to commit or continue a public nuisance cannot be acquired by prescription, either as against the public or as against an individual specially injured thereby. Even if it were otherwise, there is not sufficient evidence in this case of an open, notorious adverse claim to an easement to avail the defendants to establish a prescriptive right. The acts in question are not authorized by any valid usage or custom. The "customs of miners" have no application. They cannot control the rights of owners in fee of lands, not only non-mineral, but not in a mining region. A custom authorizing the acts complained of would be void as violating constitutional rights of private property. Besides which it would be an unreasonable custom.

A perpetual injunction was accordingly granted.

Hardt v. Liberty Hill Con. M. & W. Co., 27 Fed. 788 (1886), C. C. D. Cal. Defendant having been enjoined from discharging débris from hydraulic mining into Bear River, constructed a dam across the river in the cañon below its mines for the purpose of impounding the débris and preventing its flowing down the river and injuring com-

plainant. Defendant now moved for a modification of the decree so as to permit it to proceed with its mining operations. It presented affidavits of engineers declaring the dam sufficient to impound the débris permanently and obviate the injury to the complainant; and the latter presented affidavits of engineers of a contrary opinion. The application was denied. In view of the failure of the attempts hitherto made to impound débris of this character, "it may well be doubted whether any restraining dam, however constructed across the channels of the main mountain rivers of a torrential character, should be accepted by the courts as a sufficient protection to the occupants of land in the valleys below liable to be injured. But if any are to be accepted, they should only be those the ample sufficiency of which has been established upon testimony of the most unquestionable and satisfactory character. Nothing should be left to conjecture;" and "it would seem that such dams should be constructed by or under the supervision and in accordance with the ideas of the parties in danger and liable to be injured rather than under the supervision and according to the views of those who commit the trespasses and perform the acts which give rise to the danger, and whose interests are not endangered or in any respect liable to suffer."

It had been said by Sawyer, J., in *Woodruff v. North Bloomfield G. M. Co.*, 18 Fed. 805: "We cannot presume to determine the possibility of engineering skill in constructing these restraining dams, with 'money enough' at command, where distinguished engineers differ in opinion upon the problem. It is enough for us to know that the matter rests in mere opinion, and that the opinions of men eminent in their profession are not in accord upon the question. It is obviously impossible that the court should determine in advance what dams may be built that will be sufficient, or prescribe any conditions upon the fulfillment of which defendants should be permitted to continue the acts complained of."

In re North Bloomfield Gravel Min. Co., 27 Fed. 795 (1886), C. C. D. Cal. Running a tunnel of 2,500 feet into respondent's mine, and washing the earth removed therefrom, and washing the earth from caves of the banks occurring from time to time, by a hydraulic monitor, and other washing of earth and débris by water flowing over the high banks of the mine into a tributary of the Yuba River, is a violation of the injunction perpetually restraining defendant "from discharging or dumping into the Yuba River or its tributaries any of the tailings, boulders, cobble stones, gravel, sand, clay, débris, or other refuse matter" from any of their mines; and is a contempt. "It can make no difference whether the refuse matter is thrown into the streams by what is strictly called hydraulic mining or drift mining. This can only be a question of degree in the injury resulting. The acts found by the master are clearly within the terms of the decree and the acts complained of." Even if the decree could be limited to hydraulic mining, the acts complained of were hydraulic mining within the meaning of the term as used in the decree.

Woodruff v. N. Bloomfield G. M. Co., 45 Fed. 129 (1891), C. C. N. D. Cal. The mining company having built an impounding dam, proceeded to mine; they carried their tailings into this dam, where

they settled, and the water flowing over the dam was discharged into the Yuba River. The defendants having been accused of contempt for thus violating the decree of Jan. 23, 1884, it was held that in the absence of evidence showing that the water flowing over the dam contained refuse to an appreciable extent, or that defendants were in some other way running refuse into the stream, they were not guilty.

Tennessee C. I. & R. Co. v. Hamilton, 14 So. Rep. 167 Alabama. (1893). Defendant was engaged in mining iron ore from its own lands. It set up a washer, and operated it by means of the waters of a stream flowing past the land, and returned the water after so using it into the stream. Plaintiff owned land bordering on the stream below defendant's, and used the water for farming and domestic purposes. She brought this action against defendant for damages caused by the pollution of the water by defendant's use of it. The burden was on the plaintiff to establish the alleged pollution, after which the question was, whether plaintiff's use of the water was reasonable, which was a question of fact.

The defendant's evidence showed that the ore was valueless without washing, that the creek was the only available water supply, that there was no other outlet for the water after it was used, and that it had resorted to the customary and best means of purifying it before permitting it to flow back into the creek.

It was held that the interest of the public and of an important industry required a modification of the individual right of the riparian owner to the normal purity of the water. "But there is a limit to this duty to yield to this claim and right to expect and demand. The watercourse must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted, as practically to destroy or greatly to impair its value to the lower riparian owner."

It is competent for defendant to show that other persons also were polluting the stream above plaintiff's property.

Bear River & Auburn Water Co. v. N. Y. Mining Co., California. 8, 327 (1857). The first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel. He is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch, as it existed at the time of subsequent appropriations of the stream above him. But deterioration in the quality of the water by reason of its being used for mining purposes, before it reaches the ditch of the prior locator, must be deemed *damnum absque injuria*.

Hill v. King, 8, 336 (1857). Plaintiff, a ditch company, constructed a ditch, appropriated the waters of a stream, and sold them for mining purposes. Defendants subsequently located mining claims on the stream and above plaintiff's ditch, and in working their claims occasioned a material and essential injury to the water, so as to impair its value for mining purposes. *Held*, defendants were liable to plaintiff for the damage, although they may have worked their claims in the most reasonable and practicable manner, and did no more damage than was necessary in order to work their claims.

Wilson v. Bear River Water & Min. Co., 24, 367 (1864). If a tract of land in the mineral region, bordering on a stream, is enclosed

and appropriated for garden and orchard purposes, and the waters of the stream are afterwards appropriated for mining purposes at a point above the enclosed land, the water thus appropriated must be so used as not to materially injure the fruit trees and garden. The injury here consisted of flooding the orchard and garden with mud and sediment.

Hill v. Smith, 27, 476 (1865). Where a ditch has been excavated from the bed of a stream and the water diverted for mining purposes, a miner subsequently locating along the stream and above the head of the ditch has no right to work his claim so as to mingle mud and sediment with the water, and injure its value to the ditch owner for mining purposes, and to fill up the ditch and reservoirs so as to lessen their capacity and increase the expense of cleaning them. It matters not how cautiously or carefully the miner works, or that he has worked his claim so as to do the least possible injury. If he has injured the lower owner, he is liable.

Hill v. Smith, 32, 166 (1867). Where a large number of persons are mining on a small stream, and each deteriorates the water a little, so that the combined acts of all render the water unfit for use by a prior appropriator for mining purposes, each cannot successfully defend an action on the ground that his act alone did not materially affect the water.

Robinson v. Coal Co., 50, 460 (1875). If one who is engaged in coal mining causes water, sand, clay and refuse in a flowing mass to descend upon the land of another so as to destroy its value for cultivation, and such descent is the direct result of the act of the party and not merely of natural laws, the persons whose lands are injured may recover damages and enjoin the future commission of such acts.

Robinson v. Coal Co., 57, 412 (1881). Defendant, in working his coal mine, caused the deposit of coal screenings, ashes and other refuse in a natural stream of water. These were carried down by the water and deposited upon the land of the plaintiff. The defendant was held liable for damages thus caused, although the stream in its natural course inundated plaintiff's land.

People v. Gold Run D. & M. Co., 66, 138 (1884). The defendant owned five hundred acres of mining land on the North Fork of the American River, the surface being one thousand feet above the river. The defendant worked this land by the hydraulic process, and discharged the debris into the river. It had done so for eight years, discharging into the river annually six hundred thousand cubic yards of boulders, cobbles, gravel and sand. This, mingling with the discharge from other hydraulic mines and the products of natural erosion, was deposited in the beds of the American and Sacramento Rivers and on the adjacent lands. The bed of the former had thus been raised from ten to twelve feet, and of the latter from six to twelve, the channels were rendered shallow, the liability to overflow increased, causing the floods to cover a greater area and to be more destructive than they otherwise would have been, and covering the land with mining debris. The navigation of the rivers was likewise impaired by the lessening of their depth, — a part thereof, which had previously been navigable by steamers of deep draught, being unnavigable thereby except at high water.

The defendant was enjoined from further deposit of débris in the river.

"To make use of the banks of a river for dumping places, from which to cast into the river annually six hundred thousand cubic yards of mining débris, consisting of boulders, sand, earth and waste material, to be carried by the velocity of the stream down its course, and into and along a navigable river, is an encroachment upon the soil of the latter and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair the navigation of a river, but at the same time affect the rights of an entire community or neighborhood or any considerable number of persons to the free use and enjoyment of their property, they constitute, however long continued, a public nuisance."

An injunction will issue against the defendant although others were engaged in the same wrongful act, and it was not found as a fact whether defendant's working alone materially contributed to the evil.

The right to continue this nuisance could not be acquired by custom or prescription.

Hobbs v. Amador & Sacramento Canal Co., 66, 161 (1884). The owner of a mining claim may not work it so as either directly or indirectly to cover the land of his neighbor with mining débris, sand and gravel. An injunction was accordingly granted to restrain such an owner from discharging or dumping tailings or débris into the streams and trenches above plaintiff's land, which was subsequently modified to permit him to work his mine and use his supply of water to preserve his dam and other structures, so long as he should impound and restrain the coarse débris. It makes no difference, apparently, that the decision renders hydraulic mining by defendant impossible.

County of Yuba v. Cloke, 79, 239 (1889). The business of hydraulic mining is not in itself unlawful, or necessarily injurious to others, and the sale of water to be used in such business is lawful, and will not be enjoined on the ground that such business will be in fact so conducted as to work injury to others, unless the defendant is directly connected with the wrongful act complained of,—as by a knowledge that the water sold by him was to be used in a manner to injure others.

People ex rel. Wolpert v. Rogers, 12, 279 (1888). A **Colorado**. complaint setting forth that the relators are owners of agricultural lands in certain counties dependent upon irrigation, and seeking to enjoin the operation of certain stamp mills, which polluted the waters of the stream from which the relators obtained their water, though its final determination may seriously affect either the agricultural or mining prosperity of four counties, tenders an issue of a private character and not of a public character, and the Supreme Court will not assume original jurisdiction thereof.

Bushnell v. Proprietors of Ore Bed, 31, 150 (1862). **Connecticut**. The plaintiff had formerly conveyed to the defendants, an ore company, the right of washing their ore upon a small stream that ran through his land, and to discharge dirt upon his "meadow lot" lying below upon the stream. A great quantity of dirt accumulated upon the meadow lot, filling the bed of the stream and raising

the lot above the adjoining land, so that the dirt washed upon the lot spread, and was carried upon the plaintiff's pasture lot adjoining. The plaintiff owned this lot at the time the deed was given. *Held*, that the defendants were not liable for any damages to the pasture lot resulting naturally from the discharge of dirt upon the meadow lot.

Georgia. *Palmour v. Mitchell*, 69, 750 (1882). One who sold land on a creek for mining purposes, with full knowledge of the use to which it was to be put, and consenting that the "tailings" from the mine should be drained off through the creek, and consequently through a reservoir which he had for operating a mill lower down the creek than the mine, could not complain if such drainage was used and his reservoir was injured thereby.

Satterfield v. Rowan, 83, 187 (1889). An upper riparian owner who, by building a dam and washing ores in a stream, renders it unfit for use by the lower owner and diminishes the flow of water, is liable for the damages caused thereby. It was pleaded in this case that the use of the stream made by the defendant was reasonable and sanctioned by the usage of the country, and that the stream was of more use and value to the defendant and all adjacent and subjacent owners for the purpose of washing ores, than to plaintiff and all subsequent riparian owners for the purpose to which he put it as alleged in his declaration, viz. as a farm and dwelling; the first of which seems to have been decided against defendant, no mention being made of the last.

Michigan. *Edwards v. Allouez Mining Co.*, 38, 46 (1878). A man bought for speculation certain bottom lands upon which large quantities of sand were being deposited by a stream which carried it down from a stamp mill which operated a copper mine. He tried to sell the lands for an amount from three to five times what they cost him, to the owners of the mill, but they declined to buy. He then prayed for an injunction to restrain the owners of the mill from casting sand on his land and polluting the stream. An injunction was refused, but the case was referred to a jury to assess the damages.

Montana. *Nelson v. O'Neal*, 1, 284 (1871). An owner of mining ground is entitled to the free use of the channel of a creek, to allow the water which comes down from above to flow away from his mining ground; but he has no right to fill the channel with tailings and debris, and let them flow down upon another's ground.

McCauley v. McKeig, 8, 389 (1889). One who appropriates the water of a stream for the purpose of placer mining, will not be enjoined from diverting the water at the suit of another who subsequently appropriates it for purposes of irrigation. Nor will he be enjoined from running his tailings down the stream and into the plaintiff's ditch, when it was found by the jury that this was a necessary incident of placer mining, and that the plaintiff was not damaged thereby. "We are not to be understood as declaring that the owner of a placer mine may disregard the rights of others owning property adjacent to his; but the public policy of this Territory demands that a trifling, a nominal damage shall not be ground sufficient to destroy one of its leading industries. The laws of the United States, from which power the plaintiff obtains his right, granted to defendant the right to use

the water for placer mining purposes, and we think we have no power to deprive them of that right by enjoining him from doing that which is a necessary incident to the enjoyment thereof, certainly not at the request of one who is a subsequent purchaser from a common grantor."

McCormick v. Horan, 81, 86 (1880). "The right of

New York. an owner of lands through which a watercourse runs to have the same kept open, and to discharge therein the surface water which naturally flows thereto, is not limited to the drainage and discharge of surface water into the stream in the same precise manner as when the land was in a state of nature, and unchanged by cultivation or improvements." Such an owner, who excavated upon his land a quarry, into which was collected water and melting snow, which would otherwise have drained into the stream, had a right to pump it into the stream, although his so doing increased the flow of water to an amount greater than it would have been, the natural capacity of the stream being in this case sufficient to carry off the water without damage to the lower riparian owner.

Columbus & Hocking C. & I. Co. v. Tucker, 48, 41 (1891). **Ohio.** If the owner of a coal mine situate on the bank of a stream intentionally deposits therein coal, dirt, slack and refuse, or intentionally deposits the same upon the banks so that it will be washed into the stream by natural agencies, he is liable to lower riparian owners for damage caused thereby by overflowing their land, filling up and polluting the stream. The intention may be inferred from the circumstances.

"Of course the right of the coal company, as a land owner, to the natural and full use of the soil, is measured by the same rule as that applied to the like right of the plaintiff. But the right it insists upon is something different from the natural and ordinary use of the soil. While not an unusual one perhaps with those engaged in the same business in the locality, it is an exceptional rather than a common and ordinary one. It is not incidental to the use of the soil itself, as such; indeed, is destructive of what is the most common use of the soil, viz. for agricultural purposes."

The acts in question cannot be justified on the ground of custom, or that they are necessary to the successful conduct of defendant's business. "If the injury complained of were merely a fanciful wrong, or produced simply personal discomfort, such as any dweller in a town is necessarily subject to by reason of the operations of trade which may be there carried on, and which are actually necessary, not only for the enjoyment of property, but for the benefit of the inhabitants of the town and the public at large, there might be no real ground of complaint; but where the result of the acts of one on his own land is a direct and material injury to the property and property rights of another, a very different question arises, and in such cases the maxim *sic utere tuo ut alienum non laedas* applies." Besides, the acts complained of here are, by statute in Ohio, a nuisance. Act April 15, 1857; Act March 27, 1875; Rev. Stats. 6925.

New Boston C. & M. Co. v. Pottsville Water Co., 54, 164 (1867). **Pennsylvania.** A water company filed a bill for an injunction against a mining company, to restrain them from polluting the

water of a stream from which the former supplied the town of Pottsville. The evidence not being clear that the water, where taken from the stream by the water company, was affected by the drainage from the mines, it was error to grant a preliminary injunction.

Little Schuylkill N. R. & C. Co. v. Richards, 57, 142 (1868). A dam was filled with coal dirt washed down from deposits made on the lands of a mining company, as well as on the lands of others unconnected therewith. The court charged that if at the time defendants were throwing coal dirt into the stream the same thing was being done at other collieries, and they knew it, they were liable for the combined result of all the deposits. This was error. The defendants' tort, in the absence of concerted action with the others, was several, and the difficulty of determining what part of the dirt in the dam came from defendants' mine would not make them liable for the negligence of others.

Brown v. Torrence, 88, 186 (1878). If a stream of water passing through a tract of land is polluted and rendered unfit for use by reason of the discharge of refuse from the mines beneath the land, the surface owner may recover damages therefor from the mine owner.

Pennsylvania Coal Co. v. Sanderson, 113, 126 (1886), overruling *s. c.* 86, 401, and 94, 302. One operating a coal mine in the ordinary and usual manner may, upon his own lands, drain or pump the water from his mine to the surface, whence it may drain into a stream which forms the natural drainage of the basin in which the mine is situated, although the quantity of the water of the stream may thereby be increased, and its quality so affected as to render it totally unfit for use for domestic purposes by the lower riparian owners.

The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated water from which rendered the stream entirely useless for domestic purposes, must, *ex necessitate*, give way to the interests of the community, in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal.

"It will be observed that the defendants have done nothing to change the character of the water, or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing on to the land artificially. The water as it is poured into Meadow Brook, is the water which the mine naturally discharges; its impurity arises from natural, not artificial causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it.

"It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property."

"The defendants, being the owners of the land, have a right to mine the coal. It may be stated, as a general proposition, that every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is

damnum absque injuria, for the rightful use of one's own land may cause damage to another without any legal wrong.

"Mining in the ordinary and usual form is the natural user of coal lands; they are, for the most part, unfit for any other use. 'It is established,' says Cotton, L. J., in *West Cumberland Iron Co. v. Kenyon*, L. R. 11 Ch. Div. 773, 'that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations.' In the same case, Brett, L. J., says: 'The cases have decided that where that maxim (*sic utere tuo ut alienum non lædas*) is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.' L. R. 11 Ch. Div. 787.

"The right to mine coal is not a nuisance in itself. It is, as we have said, a right incident to the ownership of coal property, and when exercised in the ordinary manner, and with due care, the owner cannot be held for permitting the natural flow of mine water over his own land, into the watercourse, by means of which the natural drainage of the country is effected.

"There are, it is well known, percolations of mine water into all mines; whether the mine be operated by tunnel, slope or shaft, water will accumulate, and, unless it can be discharged, mining must cease. The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends; the discharge of the water is therefore part and parcel of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the State.

"The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned; they were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control; as the mining operations went on, the water by the force of gravity ran out of the drifts and found its way over the defendants' own land to the Meadow Brook. It is clear that for the consequences of this flow, which by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants."

"But it does not appear from any evidence in this cause, that the mine was conducted by the defendant, in any but the ordinary and usual mode of mining in this country. The deeper strata can only be reached by shaft, and no shaft can be worked until the water is withdrawn. A drift is in some sense an artificial opening in the land and accumulates and discharges water in a greater volume and extent than would otherwise result from purely natural causes, yet mining by drift has, as we have seen, been held to be a natural user of the land. So, too, we think, according to the present practice of mining, the working of the lower strata by shaft, in the usual and ordinary way, must be considered the natural user of the land for the taking out of the coal,

which can be reached by shaft only; and, as the water cannot be discharged by gravity alone, it must necessarily, as part of the process of mining, be lifted to the surface by artificial means, and thence be discharged through the ordinary natural channels for the drainage of the country."

"We do not say that a case may not arise in which a stream, from such pollution, may not become a nuisance, and that the public interests as involved in the general health and well-being of the community may not require the abatement of that nuisance. This is not such a case; it is shown that the community in and around the city of Scranton, including the complainant, is supplied with abundant pure water from other sources; there is no complaint as to any injurious effects from the water to the general health; the community does not complain on any grounds. The plaintiff's grievance is for a mere personal inconvenience, and we are of opinion that mere private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."

Gallagher v. Kemmerer, 144, 509 (1891). In trespass for injury to plaintiff's lands, it was shown that refuse and waste from defendants' coal breaker, on their own lands, were carried down the stream, filled the bed thereof, overflowed, and accumulated upon plaintiff's bottomland, rendering the same unproductive and worthless. It was made to appear that a portion of the accumulated refuse, fouling the stream and injuring the plaintiff's land, had come from the coal breaker of another company operating independently, on their own lands, on the same stream, and above the coal works of the defendants.

The liability of the defendants sued began with their own act on their own land, and, being independent of the acts of the other operators, it was several when committed, and did not become joint because the general consequences were united. Wherefore the defendants were liable separately for the results of their own act, though difficult of exact ascertainment; and they were not discharged by a prior quitclaim and release executed by the plaintiff to the upper operators, for all injury done by them in their operations.

Williams v. Fulmer, 151, 405 (1892). Where the owner of a quarry, by depositing the waste thereof in a navigable river, obstructed the water power of a riparian owner below, and diverted the stream from its natural channel in front of his land, he could recover damages for the latter, but not for the former. The stream being navigable, he was without title to the water, but it was an actionable injury to deprive him of the advantages of his location.

Williams v. Union Imp. Co. & J. T. Co., 1 Dist. Rep. 288 (1892). Defendants, owning coal mines, instead of draining into the stream running through the valley in which they were situated, proposed to conduct their waste water by means of a tunnel five miles long, through the mountain, and discharge it into another basin, which formed the drainage of a valley containing no mines, but devoted to agricultural

purposes. This will be enjoined at the suit of owners along the stream in this valley. The case differs from *Pennsylvania Coal Co. v. Sanderson*, and is not rendered analogous by the fact that the water was deposited on ground belonging to defendants.

Elder v. Lykens Valley Coal Co., 157, 490 (1893). Williams, J.: "If the drainage from the mines falls into and pollutes a stream of water and injuriously affects lower riparian owners, this fact alone will not impose liability on the owner of the coal. *Sanderson v. Coal Co.*, 113 Pa. 126. He may deposit the culm and refuse from his mines on his own land, where they will be safe from encroachment by ordinary floods. If an extraordinary flood should reach and carry away any portions of the culm so deposited, and leave it on the lands of lower riparian owners, he is not liable for the injury so sustained. But he must deposit the culm and refuse on his own lands. He has no right to throw it into the streams, or leave it where ordinary floods will carry it down upon the lands of others; *Lentz v. Carnegie Bros.*, 145 Pa. 612. If he does throw it into the stream, or leave it where ordinary floods will carry it away, then the injury that his neighbor may suffer therefrom is not the natural and necessary consequence of the rightful mining of coal, but of the want of proper care in disposing of the refuse product of the mines. For an injury resulting from the want of care an action will lie."

"If, on the other hand, the evidence satisfied the jury that the defendant had thrown the culm into the stream where every flood, as well as the ordinary current, would act upon it, and carry it gradually down the stream, the fact that an extraordinary flood quickened its descent and gave the final impulse that lodged it on the plaintiff's land is not enough to bring the case within the rule."

Pfeiffer v. Brown, 165, 267 (1895). Defendant, boring an oil well, pumped therefrom salt water, which was turned into a storage tank, and thence drawn off and allowed to flow by a natural depression over plaintiff's land. Plaintiff afterwards diverted it into a neighboring brook by means of a ditch ploughed along the line of depression. *Prima facie*, defendant, having increased the aggregate quantity of water discharged, concentrated it at an artificial point of flow and changed its character from fresh to salt, whereby it became more injurious to plaintiff's land, was liable for the injury caused thereby. He claimed to be excepted from the general rule, because the water was discharged in a lawful and proper use of their own land, under the authority of *Pennsylvania Coal Company v. Sanderson*.

It was held, however, that this exception did not go beyond proper use and unavoidable damage, and the defendant was liable for the injury, if he could have avoided inflicting it by reasonable care and expenditure.

"If the expense of preventing the damage . . . is such as practically to counterbalance the expected profit or benefit, then it is clearly unreasonable, and beyond what he could justly be called upon to assume. If, on the other hand, however large in actual amount, it is small in proportion to the gain to himself, it is reasonable in regard to his neighbor's rights, and he should pay it to prevent damage, or should make compensation for the injury done. Between these two extremes

lies a debatable region where the cases must stand upon their own facts, under the only general rule that can be laid down in advance, that the expense required would so detract from the purpose and benefit of the contemplated act as to be a substantial deprivation of the right to the use of one's own property. If damages could have been prevented short of this, it is *injuria* which will sustain an action."

A proper standard of estimating damage is not given where the court charges that if the injury could have been avoided "at slight expense or at small expense," it was the duty of defendant to make such expenditure.

The simple device resorted to by the plaintiff avoided the injury, and was evidence upon which the jury should have found that defendants should have foreseen the result of their operations and provided against it.

Hindson v. Markle, 171, 188 (1895). The rules laid down in *Elder v. Lykens Valley Coal Co.*, *ante*, were repeated and followed.

The defendant here pumped water from his mine, used it to wash the coal, and then carried it by troughs to a point on his own land. Some of the culm was dropped and deposited on the land, and some carried by the water in troughs directly into the stream, or into a gully that led into the stream.

Green, J.: "The case of *Penna. Coal Co. v. Sanderson*, 113 Pa. 126, is not at all in point. That was the mere flowing of natural water which was discharged by natural and irresistible forces, necessarily developed in the act of mining prosecuted in a perfectly lawful manner. While the mine water thus discharged polluted the water of the stream in which it necessarily flowed, it caused no deposit of any foreign substance on the land of the plaintiff and did not deprive her of its use."

Commonwealth v. Russell, 172, 506 (1896). The owners of land which they operated for oil, after separating the oil from the salt water with which it was mixed, allowed the latter to run out upon the surface, whence it drained into a stream, from which the borough of Butler was supplied with water. The water was thus rendered unfit for use. This case was held not to be ruled by *Pennsylvania Coal Co. v. Sanderson*. The rights of the public stand on higher ground than the personal inconvenience and injury of an individual. The fact that the water from this stream was supplied to the borough by a water company does not alter the public character of the right. This was a bill in equity to enjoin the pollution of the stream. The court below dismissed the bill. The Supreme Court reversed this action, and sent the case back for additional findings as to the condition of the ground, the extent and value of the oil operations, the possibility of working the oil wells without contaminating the stream, whether this contamination could be prevented by any means, whether the plaintiff could obtain a water supply elsewhere, and the expense of so doing, etc.

V. DRAINAGE.

The owner of a mine on a higher level may allow the water therein to flow in natural channels and percolations into an adjoining mine, but he may not, in the absence of an easement or license to do so, discharge it by means of artificial drains into such adjoining mine. He may permit the water to flow where it naturally will in the course of ordinary mining, and is consequently not bound to impound it to prevent its flowing into an adjoining mine. The lower mine is under a natural servitude to an adjoining higher one to receive water flowing down to it naturally by the force of gravitation.¹ The owner of the latter may not, however, allow water to flow into the mine on the lower level, or to fill up his own mine to the destruction of an easement which the owner of a lower level has therein.

The owner of the latter may take out all of his mineral, and the owner of the former, if he wishes to prevent the flooding of his mine, must leave upon his side of the boundary sufficient barriers to protect it. This duty to dam is, however, only for the mine owner's own protection. To an owner of a mine of still lower level he owes no obligation to leave or build such a barrier against higher mines, nor having built is he bound to maintain it, though by building the dam he increases the volume of water, which he may subsequently discharge upon the lower mine.² Where, however, the owner of one mine conducts into the adjoining mine water which otherwise would not go there, or causes water to go there at different times or in larger quantities than it otherwise would, he is liable for the damage resulting. He may not, therefore, construct a drain emptying into the neighboring mine. He may not dam up and change the course of a stream so as to discharge its waters into the adjoining mine. He may not break through the barrier left by the adjoining owner to protect his mine. These are all trespasses for which he will be responsible in damages. This responsibility is unaffected by any question of negligence: but he may be likewise held liable for such overflow as is occa-

¹ The mine owner's right of drainage is the same as the right of surface drainage at the civil law. The law as stated has been applied in at least one State where the common law as to surface drainage is followed. Whether this course would be taken in others is of course doubtful. For

an exposition of the law of surface drainage, see *Walker v. Southern Pac. R. Co.* 165 U. S. 602.

² See, however, Pennsylvania Act May 15, 1893, art. ix. sec. 4; Act June, 1891, art. iii. sec. 10, P. L. 183.

sioned by bad mining or insufficient pumping of water flowing in from the surface. It is a duty which the mine owner owes to his adjoiner to pump not only what is sufficient for ordinary drainage, but to provide against heavy rains and snows, which, by their periodical recurrence, might be anticipated. There is, however, no duty to pump out water that has accumulated naturally from the force of gravity. A mine owner is under no obligation to keep his mine pumped out for the benefit of his neighbor. Consequently he cannot be charged with the cost to his neighbor of pumping water that has naturally drained into the latter's mine.¹

Whether a mine owner may be held liable for failure to support the surface whereby water from the surface is introduced into his mine and flows into the adjoining one, is the subject of dispute. In Pennsylvania, and formerly in New Jersey, the position was taken that the mine owner's duty to support the surface was absolute, and the mine owner was responsible for injury resulting from the introduction of surface water caused by withdrawing the ribs, pillars, or other supports; and he would be enjoined from such removal. This would be undoubted where the defendant had connected his mine with plaintiff's by his own trespass, but as a general principle it is denied in the most recent case in New Jersey. The right of surface support is not a right of the adjoining but of the superjacent owner. To the adjoining owner, the mine owner only owes the duty of mining carefully and in the ordinary way. If he does this he may remove all the minerals from his mine without regard to the damage to his neighbor by flooding.

Where the owner of the upper mine first reaches the boundary and mines over it, and either himself breaks into the lower mine, or the owner of that mine subsequently breaks into the excavation made by him, he is liable in trespass, but cannot be compelled in equity either to close the opening or to prevent the flow of water into it.

The cause of action is the trespass in mining over the line, not the flowing of the water, and the Statute of Limitations runs from the date of that trespass.

The measure of damages is the actual loss sustained in delay, loss of time, damage to machinery, and the like. If the mine is

¹ As to tapping bituminous coal mines in Pennsylvania, see Act May 15, 1893, art. ix. sec. 3.

irreclaimable, that is, if the cost of removing the mineral would exceed its value when removed, then the measure of damages is the value of the estate. The better opinion is that loss of earnings is not a proper measure of damages.¹

The drainage of mines is a matter of such general importance, that in many of the States the legislature has enacted statutes governing the mode in which it should be conducted. Provision is made for drainage over or through adjoining lands, and every right of eminent domain has been given for acquiring the necessary ground for drainage. The constitutionality of this grant may at least be considered doubtful.²

Some States, again, have provided elaborate systems of joint drainage by adjoining owners;³ and Iowa has prescribed a royalty to be paid to those who rid a mine of water,⁴ while in Missouri the owner of mines is compelled to drain for the benefit of his licensees, or be deprived of a remedy for the collection of his rent.⁵ In North Carolina it is made a misdemeanor to obstruct a drain.⁶

In the public land States, the regulation of drainage has been left by Congress to the local legislatures.⁷

United States. *Prevost v. Gorrell*, 5 W. N. C. 149 (1877), C. C. E. D. Pa. Plaintiff and defendant leased adjoining mines from the same landlord. A former tenant of plaintiff's mine had committed a trespass by crossing the division line and thus connecting the mines. In an action of trespass for causing water to flow into plaintiff's mine: *Held*, defendant had the right to take out all the coal within the boundaries of his lease, subject to the requirements of skilful and careful mining. He was responsible for drainage into plaintiff's mine, occasioned by the use of artificial contrivances not resorted to in the course of good and skilful mining; for such overflow as was occasioned by insufficient pumping capacity and bad mining;

¹ See, however, *Prevost v. Gorrell*, *post*.

² California, Code Civ. Proc. sec. 1238; Georgia, Code 1882, art. 7, secs. 742-53; Idaho, Rev. Stats. 1887, sec. 3142; Illinois, Hurd's Rev. Stats. 1895, ch. 94, sec. 1, p. 1052; 2 Starr & Curtis Ann. Stats. 2738; Iowa, Rev. Code, 1888, tit. x. ch. 2, p. 421, secs. 1228-35; Montana, Pol. Code 1895, secs. 3630-41; Code Civ. Proc. 1895, sec. 2211; Nevada, Gen. Stats. 256-273; North Carolina, Code 1883, secs. 3293-8; Pennsylvania, Acts April 14, 1868, P. L. 293; Feb. 18, 1870, P. L. 197;

March 24, 1868, P. L. 438; May 15, 1893, art. ix., P. L. 55; Wisconsin, Ann. Stats. 1889, secs. 1650-5, pp. 989, 990. See also *ante*, p. 591.

³ Arizona, Rev. Stats. 1887, secs. 2352-7; Colorado, M. A. S., secs. 3172-3180.

⁴ Rev. Code 1888, tit. x. ch. 2, p. 421, secs. 1229-35.

⁵ Gen. Stats. 1889, sec. 7043.

⁶ Code of 1883, sec. 3301.

⁷ Rev. Stats. 2338; Colorado, Const., art. xvi. sec. 3.

for surface water which was introduced into his mine by reason of badly constructed ditches on the surface and insufficient pumping. The measure of defendant's duty as to pumping capacity is not that which is sufficient to provide for ordinary and useful drainage, but he must provide also for such heavy and continued rains and melting snow as by their understood periodical recurrence might be anticipated.

The measure of damages was the plaintiff's loss of legitimate earnings, which is the difference between the cost of mining and preparing the coal for market, and the market prices when prepared, upon such quantity as plaintiff shows satisfactorily he was provided with necessary means to mine and prepare, and that he could ship and sell.

California. *People v. Parks*, 58, 624 (1881). The act of April 23, 1880, entitled "An act to promote drainage," is unconstitutional, as it contravenes the provision of the constitution requiring every act to embrace but one subject, which should be expressed in its title. This act among other things provided for the appointment of commissioners to investigate the subject of drainage with a view to the control of debris from mining and other operations.

Illinois. *Bannon v. Mitchell*, 6 Ap. 17 (1880). Where defendant in mining coal passed over the line of his land and removed a quantity of coal left by the adjoining owner on his land as a barrier, and in consequence of such removal the water from defendant's mine flowed into the mine of the latter, and rendered further mining impracticable, the adjoining owner may recover substantial damages. If the flooding makes it so difficult to get the coal out that the expense of taking it out is greater than its value when taken out, it may be treated as destroyed, and recovery be had accordingly.

Jones v. Robertson, 116, 543 (1886). Each of the owners of adjacent mines has the right to take out all of the coal within his own boundaries up to the dividing line; but it is incumbent upon the owner of the lower mine to protect himself from water flowing naturally in his direction, and for this purpose he should leave a wall of coal within his own boundaries of sufficient width and strength to protect him from the encroachments of the water from the upper mine, which, if unobstructed, would necessarily flow into his own.

Where a mining district consists of numerous adjoining mines, and those of the upper part of the dip, or on the higher level, have been exhausted and abandoned, and have filled with water, which presses upon and passes into those below, the owner of a mine not yet exhausted may build a dam to hold back the accumulating water while he continues his operation. When the dam breaks and floods his own and a lower mine, he is not liable for injury to the lower mine, although this mine might have been saved if, instead of building the dam and accumulating the water behind it, the owner of the upper mine had abandoned his mine and allowed water to flow in without restriction.

Iowa. *Ahern v. Dubuque Mining Co.*, 48, 140 (1878). Section 1229 of the Code, providing that any person who shall by drains or adit levels rid lead-bearing mineral lands of water, making them productive or available for mining purposes, shall be entitled to receive one-tenth of all the lead mineral taken therefrom, is constitutional. This statute is identical in principle with those regulating party walls

and partition fences, and provides only that one should compensate another for outlays lawfully made by which he himself has been benefited. There is no taking of private property, but the recovery of compensation for benefits rendered. The building of an adit is a matter of public interest, and of great good, and for that reason is lawful.

Maine. *Ulmer v. Farnsworth*, 80, 500 (1888). Compensation for pumping from a quarry water which ran into it from an adjoining quarry, where it accumulated, cannot be recovered in an action of assumpsit against the owner of the other quarry, when there is no evidence of a promise to pay for such services.

Michigan. *National Copper Co. v. Minnesota Mining Co.*, 57, 83 (1885). One of two adjoining mine owners broke over the dividing line, but not into the neighboring mine. Subsequently the owner of the latter mine in its operations reached this opening, and over fifteen years afterwards, upon the abandonment of its mine by the trespassing owner, the accumulated water flowed into the lower mine. *Held*, that an action of trespass was barred by the Statute of Limitations.

The breaking over the line was a trespass, but the failure to fill up the hole so made was not a continuing trespass. The leaving of a hole in the wall of another is not a trespass. The mere flowing of the water from one mine into the other did not constitute an act of trespass. Neither party was under obligation to keep his mine pumped out for the benefit of its neighbor. Either was at liberty to discontinue its operations and abandon its mine whenever its interest should seem to require it.

New Jersey. *Thomas Iron Co. v. Allentown Mining Co.*, 28 Eq. 77 (1877). Where the owner of mines has mined over the boundary, and taken ore from the land of an adjoining owner, he will be enjoined from mining his land to exhaustion so as to let down the surface, if his so doing will cause the waters of a swamp on the surface to be conducted through the openings made by him into his neighbor's ore beds.

Lord v. Carbon Iron Mfg. Co., 38 Eq. 452 (1884). A lower mine is under a natural servitude to an adjoining higher one to receive water flowing down to it naturally.

It is the natural right of each of the owners of two adjacent mines to work his own mine in the manner most convenient and beneficial to himself, though the natural consequence be that some injury will accrue to his neighbor. For damages resulting from natural causes, or from lawful acts done in a proper manner, the law gives no redress; but when one of two adjoining mine owners conducts water into his neighbor's mine, which would not otherwise go there, or causes water to go there at different times and in larger quantities than it would naturally go there, he is answerable in damages.

Equity will restrain one of two adjacent mine owners from removing the supports which prevent the surface from caving in, when such removal will result in the destruction of his neighbor's mine.

Lord v. Carbon Iron Mfg. Co., 42 Eq. 157 (1886). If an upper mine owner break through a barrier which was left by a lower adjacent

owner to protect his mine from water, the upper owner is liable for the trespass, but he cannot be compelled in equity either to close the opening or prevent the flow of water into it.

First and third paragraphs of abstract of last case (*Lord v. Iron Co.*, 38 N. J. Eq. 452) adopted. The owner of a mine has a right to take away the whole of the minerals. Equity will not enjoin his doing so, so as to allow the surface to subside. Whether, by reason of such subsidence, water having flowed into and damaged the adjoiner's mine, he would have an action for damages, not decided.

New York. *Genet v. D. & H. Canal Co.*, 122, 505 (1890). See this case on p. 611, *ante*.

Ohio. *Williams v. Pomeroy Coal Co.*, 37, 583 (1882). Defendants were lessees of coal under a certain lot of land, and in excavating it, mined over the boundary of the adjoining lot. This was in 1861. The plaintiff subsequently purchased the adjoining lot, and in 1868, after the determination of the defendant's lease, tapped the water that had accumulated in his mine. In an action for damages, the statute was held to run from the date of the original trespass, and the action was barred. The cause of action was the original trespass and not the creating and maintaining a nuisance.¹

Pennsylvania. *McKnight v. Ratcliff*, 44, 156 (1863). A mine owner is liable for damages to an adjoining owner, whose mine was flooded by reason of the former's damming up and changing the course of a stream.

It is no defence to an action for such damages that the plaintiffs had chosen to connect their works with those of the defendants, operating through their gangway, had extended their slope below the water level of the defendants' shaft, and had not erected any barrier between their respective workings, or to protect themselves against influx of water, which the custom of miners and the rules of good mining required. As the injury was wilful, counter negligence was not a defence.

The measure of damages was the actual injury sustained in delay, loss of time, damage to machinery, and the like; and if the mine was irreclaimable, then the value of the estate and property. Mere speculative profits, supposed to be lost, could not be recovered, and it was error to charge that if the mine was rendered entirely useless, profits that might have been made out of the coal would be a fair basis for estimating damages.

Douty v. Bird, 60, 48 (1869). In trespass for breaking a dam, and so flooding plaintiff's mine, whereby work was prevented, evidence of the amount of coal each miner would mine, and of the expense of keeping mules while the mine could not be worked, is admissible on the question of damages.

Locust Mountain Coal Co. v. Gorrell, 9 Phila. 247 (1872). The owner of an upper mine, must use reasonable diligence to prevent the flow of water from his mine into a lower mine. The maxim *sic utere tuo ut alienum non ledas* applies. When the miner in the upper mine, in carrying forward his gangway, strikes into a breast which has been wrongfully worked by a trespasser up the dip of his coal vein, he is not justified in emptying the water flowing down the drain or gutter of

¹ The effect of this case has been obviated in Ohio by Rev. Stats. 1890, sec. 4982.

his gangway into the opening thus struck, if by reasonable means he can carry the water across the drain into the gutter or drain leading into his own sumpt. But when water, following the law of gravitation after the removal of the coal in a careful and proper manner, finds its way by percolation or through fissures unforeseen and unknown, into the lower mine, its owner cannot complain of it as an injury done by the owner of the upper mine.

Phila. & Reading Coal Co. v. Taylor, 5 Leg. Gaz. 392 (1873), Com. Pleas. In the working of upper and lower levels of the same vein, the maxim *sic utere tuo ut alienum non ledas* obtains. Adjacent owners on the same level owe no special duty to one another; but subjacent owners have a servient, and superjacent owners a dominant, interest. The owner of the higher level may mine all his coal down to his line, and he is not responsible for water that flows by the force of gravitation into the lower level. The owner of the latter is bound to leave on his side of the line a sufficient pillar of coal to prevent the water in the upper level from breaking through.

When, however, the owner of the upper level created a servitude upon his land in favor of the subjacent owner, such owner, after he has worked all his coal out and is about to abandon his workings, must give reasonable notice to the owner of the dominant tenement, which in this case is the lower level, and on his failure to do so, equity will restrain him from permitting the water to fill up, if by so doing it will destroy the easement, the owner of the dominant tenement to be at the expense of pumping the water until the injury can be remedied. The legal relation of the owners of upper and lower levels under ground are much the same as those of the owners of surface and minerals.

Horner v. Watson, 79, 242 (1875). The owner of a mine is not liable for damages occasioned by the collection and flow of subterranean water upon lower mines, arising from mining coal in any ordinary way. But it is otherwise where by his mining, whether done in an ordinary way or not, he introduces foreign water from the surface or higher land, by reason of the roof falling in. The owner of the minerals owes the duty of support to the surface, from which duty no custom will excuse him.

CHAPTER XX.

WATER RIGHTS.

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| I. Water Rights on the Public Lands.
A. Appropriation.
B. Rights of Way for Ditches.
C. Injuries by Manner of constructing or operating Ditches. | D. Transfer of Title to Water Rights.
E. Abandonment of Water Rights.
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I. WATER RIGHTS ON THE PUBLIC LANDS.

IN those States where the common law of riparian rights prevails in its full force, its application to cases in which the riparian owner is a mine owner requires no modification of its principles. In the public land States, however, the law of riparian rights has given way to, or at least is often rendered inapplicable by, another system of water rights having its foundation in appropriation. As the system by which a title to mines on the public lands might be acquired had its foundation in a customary law recognized and enforced by the courts of California, so did this system arise, and gain judicial recognition. And like the mineral land system, it determines superiority of right by priority of appropriation. This system is not confined to the use of water for mining purposes. As, however, that was the use which first attracted attention in the Pacific States and Territories, and as the water right is indispensable to mining in many of them, it is thought essential to devote a chapter to the subject here. A complete treatment of the subject is not attempted, the writers contenting themselves with a general statement of the principles, and a collection of those cases only whose facts have a direct connection with the subject of mining. It should be borne in mind, however, that the authority of the precedent is not affected by the beneficial use to which the water is applied.

A. Appropriation.

The general doctrine is that the first appropriation for a beneficial purpose of the water of a stream passing through public lands

of the United States confers the right to divert, use, ~~and~~ consume the water necessary for the purposes of the appropriation ~~to the~~ extent of the original appropriation. And the appropriator becomes, so far as he has made an actual prior appropriation, the owner of the water as against all the world except the United States. A mine owner may consequently divert and convey to his mining ground the water of any stream on the public domain which has not already been appropriated.

In order to create this right, there must be an actual appropriation, or an intention to appropriate, followed by due diligence in doing so. It need not depend upon a title, either legal or possessory, to any part of the public domain, either bordering on the stream or at a distance. The appropriator may intend to use the water upon his own land, or only to sell and dispose of it to others for beneficial uses. But he must have a *bona fide* present intention of an immediate or some future application of it to some beneficial purpose. Speculation or drainage is not such a purpose.

Another essential of appropriation is actual diversion from the natural bed of the stream by artificial means into a ditch, reservoir or other structure. But a natural ravine or another portion of the same stream may be used as a means of conveyance. There must also be an actual application to the beneficial use within a reasonable time. In the meantime, such physical acts are necessary as will put other appropriators upon notice. These may depend upon the natural conditions and circumstances, or they may be fixed by local custom or statute. This done, work must be commenced and prosecuted with reasonable diligence. What this is, is a question of fact, depending on the physical circumstances of the locality, the difficulty of procuring labor, the extent of the works, etc. The appropriation does not become complete until the works are complete so that use can be begun. In the meantime the appropriator has no vested right to the water, and cannot maintain an action for the use or diversion thereof, though he has a right to use so much as is necessary to preserve his works from injury during construction. Upon completion, however, if he has pursued the work with reasonable diligence, the right relates to the date of the commencement of the work.

The manner of appropriating water is often prescribed by statute or custom, which governs its acquisition in the same way that the

acquisition of mining rights is controlled by customary or statutory regulation.¹

Of course the appropriator of land on the bank of the stream would be entitled to the use of the water, and of this he could not be deprived by a subsequent appropriator. But his right would be subordinate to that of persons who had previously taken the water, although having no interests upon the banks of the stream.

This right of the prior appropriator as against the grantee of the government is preserved by the acts of 1866 and 1870. Prior to 1866, as the right was void as against the United States, so it was as against their grantee. At that time the basis of the right of appropriation was a presumption of license, and the government's grant was a revocation thereof. The water when appropriated may be conveyed and used wherever the appropriator chooses. He is under no obligation to restore any part of it to its original channel. He is complete master of it while in his possession and control. But when he has abandoned it, and turned it loose to flow where it pleases, it then passes from his control, and is subject to appropriation again. The use, however, of natural channels and watercourses for the transportation of water does not amount to abandonment thereof.

The right of the first appropriator is limited in extent to the amount appropriated prior to the vesting of subsequent rights. Another appropriator may take water higher up the stream to any extent that will leave a residuum sufficient to supply the amount theretofore taken by the prior appropriator, or he may take all, if he will return enough to satisfy the rights of the latter. And a subsequent appropriator below may take whatever water has not been previously taken by the prior appropriator, and after the date of his so doing the prior appropriator may not increase the amount taken by him so as to decrease that taken by the subsequent appropriator. The principle is equally applicable whether the appropriation be measured by time or volume.

The right to appropriate water, however, must be exercised within reasonable limits with reference to the condition of the country and the necessities of the people. The water may not be monopolized so as to deprive a whole community of its use.

¹ California, Civ. Code 1885, secs. 1410-22; Act March 22, 1895, p. 70; Idaho, Rev. Stats. 1887, secs. 3155-67; Montana, Civ. Code 1895, secs. 1880-1902; Oregon, Hill's Ann. Laws, 1892, sec. 3832; Dakota, Comp. L. 1887, ch. 19, art. 4, sec. 2037.

Where the first appropriation is of all the water of a stream, the appropriator may enlarge his ditch at pleasure, and others cannot complain. But where his appropriation is of a part only, his right is measured by the quantity which could actually be carried by his ditch in the size and condition in which it was at the time of the subsequent appropriation. Where a ditch has been so constructed that it cannot actually carry so large an amount as its general plan and size render it capable of carrying and its appropriator intended, he may increase its capacity by removing obstructions and improving grades and the like, if he does so within a reasonable time. But if he continue to take only the original amount long enough to indicate an intent to take only that much, he will be limited to it.

A person having a right to divert a given quantity of water from a stream may do so at any point on the stream, and may change the point of diversion at pleasure, provided he does not injuriously affect vested rights. But he does not have the exclusive right to the use of the channel. This may be used by others for the transportation of water or the construction of their works, provided they do not interfere with the rights of the prior appropriator.

The subsequent appropriator must not only leave sufficient water to furnish to the prior appropriator the amount appropriated by him, but he must not do anything to deteriorate the quality of the water which the latter must use. Such deterioration, however, to amount to an actionable injury, must impair its value for the use to which it is put by the prior appropriator, that is, so far as our present consideration of the question is concerned, for the purposes of mining. A deterioration which would render the water useless for domestic purposes might in no way injure it for use in mining operations, and therefore would be no ground for an action for damages.

A subsequent appropriator in taking the water must do so in such a manner as not to injure the works of the prior appropriator of the water or of the riparian owner; as, for instance, by flooding, the result of the backing of the water by damming.

Any interference with water of a stream, either above or below the point of diversion, which hinders the full enjoyment of the appropriator's right as defined, and any interference with water in his ditch, dam, or reservoir, or with these structures themselves,

are actionable injuries. If the injury be present, it is a nuisance, and may be abated as such, or an action may be maintained on it. If it be past, the only remedy is an action for damages ; if continuous, equity will interfere by injunction.

The law of water rights as thus developed in the public land States, and sanctioned by local custom and judicial decision, was recognized by Congress by the act of July 26, 1866, sec. 9 (Rev. Stats. 2339), and the act of 1870, by which grants are made subject to vested and accrued water rights, by which is meant those vested and accrued at the date of the patent to the subsequent grantee.

United States. *Cole S. M. Co. v. Va. & Gold Hill W. Co.*, 1 Sawy. 470 (1871), C. C. D. Nev. While excavating a tunnel for mining purposes, complainants struck a stream of water which they claimed and appropriated. Subsequently defendants ran a tunnel into the mountain at a point below complainants' tunnel, and striking the stream of water appropriated it, thus draining it from complainants' tunnel. Complainants were entitled to an injunction to restrain such diversion and appropriation, although it would require the filling up of defendants' tunnel, or the building of a water-tight wall to accomplish this. And the right to this injunction is the same whether defendants were engaged in a *bona fide* mining operation or excavated their tunnel solely to obtain the water. "A stream of water, therefore, thus found in a tunnel excavated for mining purposes, is often as valuable to the possessor as the mine itself; and to take away any such supply of water from one who has acquired a right to it, by means of a tunnel excavated by another party not having a superior right for the purpose of prospecting or working his own mine, is as clearly a violation of the maxim as the destruction of a neighbor's mine in the same mode.

"The authorities cited to the point that, where one has a spring on his own land, supplied by percolating water coming from his neighbor's premises, such neighbor may by digging on his own land cut off the supply, admitting them to be correct, do not appear to me to reach this case. The defendants do not appear, by the affidavits, to have made the diversion by digging in their own lands. The water is not shown to have come from their own ledges, or from their immediate vicinity, or from any land to which they have a prior right. It does not satisfactorily appear that any one of the ledges mentioned in the papers, lying west of or beyond complainants' ledge, that could be reached or prospected by defendants' tunnel, is a prior location to that of complainants', or that defendants have a prior right to anything in the line of their tunnel to the west of complainants' ledge. The diversion is accomplished, taking the view most favorable to the defendants, by running a tunnel through other lands in search of ledges claimed by themselves, and ledges, too, the location of which, if they have any real existence, seems as yet, and according to defendants' own affidavits, after a ten years' search, to be entirely unknown.

In doing this, they ran directly beneath the place where the complainants appropriated the water on the same land, and cut it off from below; a very different condition of things from that which existed in the cases cited."

Atchison v. Peterson, 20 Wall. 507 (1874), affirming s. c. 1 Mont. 561 (1872). Field, J.: "By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early date after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners and inadequate to their protection."

"But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common law doctrine of riparian proprietorship with respect to the water of those streams."

"This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866. The act granting the right of way to ditch and canal owners over the public lands, and for other purposes, passed on the 26th of July of that year, in its ninth section declares 'that whenever, by priority of possession, rights to the use of the water for mining, agriculture, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.'

"The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied."

"What diminution of quantity or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drinking or domestic purposes, whilst it would not sensibly impair its value for mining or

irrigation. In all controversies, therefore, between him and the parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant."

Basey v. Gallagher, 20 Wall. 670 (1874). By the act of Congress of July 26, 1866, the customary law with respect to the use of the water, which had grown up among occupants of the public land under the peculiar necessities of their condition, is recognized as valid.

That law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation the latter, as of superior authority, will control. The rule that the first appropriator of water becomes the owner thereof as against subsequent appropriators, is equally applicable whether the water be used for mining or any other useful purpose. A prior appropriator for purposes of irrigation has a superior right to a subsequent appropriator for mining purposes.

This right, however, must be exercised within reasonable limits, with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.

Ison v. Nelson M. Co., 47 Fed. 199 (1891), C. C. D. Oregon. Deady, J.: "The act of July 26, 1866, maintains and protects persons who have acquired a vested right to the use of the water on the public lands for mining, agricultural and manufacturing purposes by virtue of the local customs and laws. Any one who acquires the title to any portion of the public lands since the passage of this act, takes the same subject to any such prior appropriation of water. But the State took this land before the passage of this act, and neither it nor its grantees are charged with any such burden.

"The riparian rights of the [State's grantees] are unqualified. They are entitled to all the water that flows through Pain Creek, if necessary for agricultural and domestic purposes, at least in preference to any ditch, whether made before or after the land was selected by the State."

Ramsay v. Chandler, 3, 90 (1853). The owners of California. land upon which there was a mill and mill-dam sold to the plaintiffs the right to the mill, the dam and a certain described mining claim, the right to tear away the dam, to cut a race for the purpose of draining the bed of the river for mining purposes, and of raising a dam at the head of the race for diverting the water. After they had entered, constructed the race and drained the bed of the river at great expense, it was overflowed by water forced back by a dam erected across the river by the defendant, who had erected a dam, under an agreement with the mill owners prior to the above purchase, authorizing him to cut a race for the purpose of draining the bed of the river for mining purposes. The overflowing of plaintiff's claim was a nuisance, and the defendant was ordered to reduce the height of his

dam so as to prevent the overflow, and if necessary to that end, to abate it entirely.

Eddy v. Simpson, 3, 249 (1853). The plaintiff had constructed a dam across S. creek and used the water for mining purposes. The defendant used the water of other streams for like purposes, which water subsequently flowed by natural channels into S. creek above the plaintiff's dam. *Held*, defendant did not have the right to again divert from S. creek the water which was thus added to it. The foundation of a right to water is first possession; the right is usufructuary, and consists, not so much in the fluid itself, as in its use. The right only continues with the possession.

Irwin v. Phillips, 5, 140 (1855). A miner who selects a piece of land in the public domain to work must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition from the sovereign power. If it is upon a stream, the waters of which have not been taken from their bed, they cannot be taken to his prejudice. But if they have been already diverted for the purpose of supplying water to miners working elsewhere, he has no right to complain, or to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.

Tartar v. Spring Creek W. & M. Co., 5, 395 (1855). A prior appropriation of the public domain establishes a *quasi* private proprietorship which entitles the owner to be protected in its quiet enjoyment against all the world except the government. The diversion of the waters of a stream which had supplied a mill lower down stream, erected before the defendants began mining, was enjoined.

Hill v. Newman, 5, 445 (1855). The right to water may exist in California without private ownership of the soil upon the ground of prior location of the land or prior appropriation and use of the water. It is treated as a right running with the land, as a corporeal privilege bestowed upon the occupier or appropriator of the soil, and as such has none of the characteristics of personalty. An injury arising out of a diversion of water from a natural or artificial channel is not an injury to personalty which is within the jurisdiction of a justice of the peace.

Kelly v. Natoma W. & M. Co., 6, 105 (1856). Defendants, engaged in supplying water from a river to miners, purchased a dam on a creek which naturally contained no water, except in times of freshet, and also built a dam lower down the creek, and from these conducted the water by natural and artificial courses to their customers. Plaintiffs built a dam still lower down the creek to catch the water escaping from defendants' dam. The latter, who had charged Chinamen for the use of this escaped water, notified plaintiffs that they had not abandoned the water and would charge for the same, and subsequently built another dam just above plaintiffs'. The latter were entitled to damages for the water thus cut off. "Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows. Such appropriation cannot be constructive, because there would be no rule to limit or control it, resting as it must only in intention." If defendants had first commenced to

build their dam, though their power of enjoyment would not commence until its completion, yet the right as to others would have relation to the time of commencement.

Hoffman v. Stone, 7, 46 (1857). A ditch company who avail themselves of a dry ravine to conduct their water a portion of the way to their dam, where they use it, do not abandon the water so carried into the ravine. They are entitled to the same enjoyment of it as if conducted through an artificial ditch. They cannot be enjoined by a prior appropriator of land along the ravine from diverting their water from the ravine, so long as they do not divert the water naturally flowing therein.

Sims v. Smith, 7, 148 (1857). Where parties have located mining claims upon the bank of a stream, and are using its bed for the purpose of working their claims, any subsequent erection, dam, or embankment, which will turn the water back upon such claims, or hinder them from being worked with flumes or other necessary means or appliances, is an encroachment upon the rights of said parties, and they are entitled to recover for the damages consequent on such obstruction.

Maeris v. Bicknell, 7, 261 (1857). The mere prior construction of a ditch and diverting the waters of a stream will not give priority over others. There must be an actual appropriation, or intention to appropriate, followed by due diligence. The prior construction of a ditch from a stream for drainage purposes is not an appropriation of waters as against others who wish to use it for mining purposes, but if at the time of the construction it was the intention to appropriate the water to useful purposes, which intention was afterwards carried out, the appropriation dates from the construction of the ditch.

A change in the use of water from one locality to another, by extending the ditch or building branches, does not affect the appropriator's right of priority.

Coker v. Simpson, 7, 340 (1887). A complaint showing injury by diversion of water by the construction of a ditch, though sufficient to entitle plaintiff to damages, if it does not allege that the injury was continuing or threatened to continue, will not support a decree for an injunction.

Parke v. Kilham, 8, 77 (1857). Where a party stands by and sees a ditch owner appropriate the water of a creek to his own use at a great expense, and does not inform him of his claim to the water, he and his vendees are estopped from afterward claiming it.

Crandall v. Woods, 8, 136 (1857). The appropriator of public lands is entitled to the use of watercourses naturally flowing through the lands against persons subsequently appropriating and diverting the water for any use. The rights of the appropriator of the land as against a subsequent appropriator of the water are those of a riparian owner at common law. "An appropriation of land carries with it the water on the land, or a usufruct in the water, for in such cases the party does not appropriate the water, but the land covered with water."

"One who locates upon public lands with a view of appropriating them to his own use, becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and

incidents which appertain to the soil, subject to the single exception of rights antecedently acquired."

Thompson v. Lee, 8, 275 (1857). A posted notice claiming the waters of a stream is evidence of possession, but, of itself alone, is not conclusive. It forms one of a series of acts, which together make the right perfect.

Leigh Co. v. Independent Ditch Co., 8, 323 (1857). A complaint alleging that plaintiff is owner and in possession of certain mining claims over which the waters of a certain stream naturally flowed, and that defendant had diverted the water of the stream to the plaintiff's injury, sets forth a sufficient cause of action without an allegation that plaintiff owned, or had appropriated, or been in possession of the water. The ownership and possession of the claims drew to them the right to the use of the water flowing in the natural channel of the stream.

Bear River & Auburn Water & Min. Co. v. New York Min. Co., 8, 327 (1857). The first appropriator of water for mining purposes is entitled to have the water flow without material interruptions in its natural channel. He is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch, as it existed at the time of subsequent appropriations of the stream above him. But as to deterioration in the quality of the water, by reason of being used for mining purposes before it reaches the ditch of the prior locator, it must be deemed *damnum absque injuria*.

Hill v. King, 8, 337 (1857). The subsequent locator of a mining claim above the head of the ditch of the prior appropriator of the waters of a stream is liable in damages to the latter for injuries caused by washing down mud and sediment, thereby filling the ditch and rendering the water unfit for mining purposes. "He who has first diverted the waters of a stream and appropriated them to his own use or purposes, must be held entitled to the exclusive enjoyment of the same, pure and undiminished. By this, we do not mean to say that those above him cannot use the water for any purpose; the use must be a reasonable one and the injury or diminution small or inconsiderable."

White v. Todd's Valley W. Co., 8, 443 (1857). Subsequent appropriators of water, whose ditch tapped the same stream below that of defendants, sought to recover on the ground that the latter had enlarged their ditch since the commencement of plaintiffs' ditch.

Held, they were not limited to the quantity of water they had turned into their ditch in the first place, unless by the general plan, size and grade of the ditch it was not capable of carrying more water than was then diverted. If, by reason of obstructions or irregularity of grade, it was not capable of conveying as much water as its general size would indicate, they were entitled to a reasonable time to adjust the grade and remove the obstructions, and then might fill the ditch to its capacity. A failure to do this, however, for an unreasonable length of time would limit them to the amount first diverted.

Marius v. Bicknell, 10, 217 (1858). Miners owning claims in the bed of a ravine built a dam and diverted the water, and conveyed it by a ditch past their claims and into the bed of the ravine below. The ditch was tapped as it passed each claim, and the water was used to

work the claim. This was appropriation of the water, the diversion being not only for drainage, but for mining uses; and the successors to the title of the miners to the ditch were entitled to the waters of the ravine to supply the ditch and an extension or branch of it, as against those who appropriated the water to supply other ditches after the building of the first ditch and before the building of the extension.

Weaver v. Conger, 10, 233 (1858). Owners by appropriation of a water right are entitled to an injunction against persons who enter upon the claim and break down the canal, etc., while in process of construction.

Where parties have appropriated the prior right to the use of the water of a stream, by the commencement and partial completion of a ditch and flume, they have the right to use so much of the waters of the stream as is necessary to preserve their flume from injury while in process of construction.

Butte C. & D. Co. v. Vaughn, 11, 143 (1858). The prior right to the use of the natural water of a stream does not entitle the owner of such a right to the exclusive use of the channel. So long as his right is not interfered with, there is no reason why the bed of the stream may not be used by others as a channel for conducting water. Plaintiff was the first appropriator of the water of J. creek. Defendant in conducting water from A. canal to his mining ground conducted it into J. creek, above plaintiff's dam, and at another point a mile below, but still above plaintiff's dam, constructed a ditch and diverted an amount of water less than that turned into the creek. This was held to furnish plaintiff with no cause of complaint. This case differs from those in which water finds its way into watercourses without the agency of its owner. "The first appropriator of the water of the stream passing through the public lands in this State has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. To this extent his rights go, and no further. In subordination to these rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle with its waters other waters, and divert an equal quantity as often as they choose. Whilst resting in the perfect enjoyment of their original rights, the first appropriators have no cause of complaint."

Harvey v. Chilton, 11, 114 (1858). An action by an owner of mining claims on the banks of a river, to compel a mill-owner below to remove an addition to his dam which caused the water to flow back upon the plaintiff's claims, on the allegation that it would prevent the working of these claims, is premature, as it does not appear that the plaintiff had commenced to work the claims, or that he was injured or likely to suffer damage from defendant's dam.

Ortman v. Dixon, 13, 33 (1859). A prior appropriator of water is entitled to it to the extent appropriated, but he is only entitled to so much as is necessary for the purpose for which he appropriated it; the rest is still subject to appropriation, and he cannot subsequently enlarge his right at the expense of the rights of other appropriators already vested.

In 1851 O. began the construction of a ditch from M. creek for mining purposes; it was completed by others, but was abandoned. In 1852 defendant erected a mill, and took up the waters for milling purposes. In 1853 D. constructed a ditch, No. 2, above defendant's mill, using the water of the creek only at such times as defendant was not running his mill. D. conveyed his rights to plaintiff. In 1856 defendant built a ditch, No. 3, still higher up, and diverted all the waters of the creek. *Held*, defendant was first entitled to use the water for his mill. Then when the water was not being used to propel the mill, plaintiff was entitled to it to supply ditch No. 2, and defendant was entitled to the surplus, if any, for ditch No. 3, ditch No. 2 having always a preference to ditch No. 3.

McDonald v. Bear River & Auburn W. & M. Co., 13, 220 (1859). Ownership of water, as a substantial and valuable property distinct from the land through which it flows, may be acquired by appropriation, which is the intent to take for some valuable use, accompanied by some open physical demonstration of the intent. Appropriations for all useful purposes stand on an equal footing, an appropriation for the uses of a mill being as good as an appropriation for mining purposes. Water taken for a mill, however, is not taken as an article of merchandise: it is merely used as a motive power, and after it passes the mill may be used for mining purposes, if this be not inconsistent with the mill owner's prior right, so far as his necessary use is concerned. Subsequent appropriators of the water above the mill for mining purposes are limited to water not required by the mill owner for his use, and if they take more, are liable to him for the diversion.

Esmond v. Chew, 15, 137 (1860). All persons mining in the same stream are entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein; and where, from the situation of different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*, and will furnish no cause of action to the party injured. The reasonableness of the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case.

Kidd v. Laird, 15, 161 (1860). One who is entitled to divert a given quantity of water from a stream may exercise the right at any point on the stream, and may change the point of diversion at pleasure, provided he does not injuriously affect the rights of others. Plaintiffs owned two ditches, by which they diverted a certain amount of water from a stream. Defendant owned a subsequently built ditch below plaintiffs', by which he diverted a fixed amount of water. Plaintiffs subsequently built three ditches, tapping the stream, and defendant one, between plaintiffs' three upper and two lower ditches. Plaintiffs having brought an action for diversion of water by this last ditch, it was *held* that defendant might divert by it the amount of water which he was entitled to divert by his first ditch, provided he did not interfere with the rights of plaintiffs' first two ditches; but that if the deficiency in these ditches was caused by the plaintiffs' last three ditches, there could be no recovery. Though these were built prior to defendant's last ditch, the latter was entitled as against them to the rights of his first ditch.

Weaver v. Eureka Lake Co., 15, 271 (1860). The question of diligence in the construction of a ditch for the appropriation of water so that the right thereto may relate to the date of commencement, is one of fact for the jury, whose verdict is conclusive thereof. The greater value of the use contemplated by the subsequent appropriator does not create a right superior to that of the first appropriator. A claim of water for no other object than speculation, not for any useful or beneficial purpose or in contemplation of a future appropriation for any such purpose, is invalid.

Butte T. M. Co. v. Morgan, 19, 609 (1862). The rule that one who has appropriated and diverted the water of a stream at a given point, may change the point of diversion to suit his pleasure at any time, is subject to the qualification that he does not thereby injuriously affect the rights of others.

In 1853 G. appropriated and used thirty inches of the water of a certain ravine. In 1854 L. posted notices claiming all the surplus water, and built a ditch to divert the same. In 1855 M. built a dam above L.'s ditch, diverted the water, but returned it to the ravine before it reached L.'s ditch. L. could not, in 1858, by building a dam and ditch above M.'s dam, divert all the water of the stream, depriving M. of its use. Nor if he tapped the stream above his own ditch, but still below M.'s, could he complain of the debris which flowed down naturally to that point from claims of defendant and others, if he found the new location already subjected to this deposit.

McKinney v. Smith, 21, 374 (1863). Plaintiffs built a dam across Clear Creek, and turned all its waters into a ditch which carried it to a gulch, through which it returned to its natural bed half a mile below the dam. The object of this diversion was to facilitate the working of plaintiffs' claims in the bed of the stream below the dam. Defendants then diverted the water above the dam for mining purposes, and plaintiffs after this extended their ditch several miles, and used the extension to supply water for mining. They claimed all the water, and sued defendants for diversion. They could not recover. The first diversion was not an appropriation, and the defendants were prior appropriators, except so far as the water was used by the plaintiffs in working the claims in the bed of the creek between the dam and the mouth of the gulch.

Rupley v. Welch, 23, 453 (1863). R., being in possession of a garden and orchard, for the purpose of irrigating them built a reservoir to collect the water flowing down a ravine on the premises. W. entered and began digging and sluicing for mining purposes, and threatened to divert the waters of the reservoir. Held, R. had a right to the water as prior appropriator, and was entitled to an injunction against the diversion of the water. This right was not affected by the California statutes of April 20, 1852, and April 25, 1855.

Phoenix W. Co. v. Fletcher, 23, 482 (1863). One who erects upon a stream a mill or other machinery, to be run by water, above a prior appropriator, must do so in such a way as not to impede the regularity of the flow of the water, if its irregular flow will injure the first appropriator. A mere temporary or trivial irregularity in the flow of the water, such as does not cause actual injury to the prior appro

priator below, will not be actionable; but if a sensible or positive injury be caused, such as would diminish the value of the water right, both an action and injunction will lie.

Natoma W. & M. Co. v. McCoy, 23, 491 (1863). The prior appropriator of water may recover damages for irregularity in the flow of the water in his ditch caused by the erection of a dam in the stream, provided the injury sustained is not a temporary or trivial one.

Testimony that he lost customers as a consequence of this irregularity is competent to prove that the injury was actual and serious.

The fact that defendants are miners, and used the dam to conduct the water through their sluice boxes in the bed of the stream, does not take the case out of the rule.

Wilson v. Bear River & Auburn W. & M. Co., 24, 367 (1864). The rights of miners and persons owning ditches constructed for mining purposes are not paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition; a ditch owner must exercise his right subject to prior vested rights of others. He may not, by opening the gate of his reservoir, discharge accumulated mud and sediment upon land previously occupied by plaintiff as an orchard.

Bear River & Auburn W. & M. Co. v. Boles, 24, 359 (1864). In an action by a ditch company for damages and injunction for maintaining two reservoirs across the bed of a stream which supplied its ditch with water, whereby the regular flow in the same was prevented, evidence is admissible in defence to show that it had been for a long time out of repair, unused and unfit for use.

The company had only a right by prior appropriation to use the water in its natural flow; other parties had a right to use it, so long as their use did not interfere with the right of the company; and no action could be maintained to abate the reservoirs as a nuisance until the ditch was in a condition to carry water, although the condition of the ditch was caused by the acts of the defendant before the building of the reservoirs.

Union Water Co. v. Crary, 25, 504 (1864). Where a subsequent appropriator takes water from a stream at a point above the ditch of a prior appropriator, and after using it returns it so that it reaches the latter ditch without material diminution in quantity or quality, no injury is done to the first appropriator, and he has no cause of action.

Hill v. Smith, 27, 476 (1865). Plaintiff had appropriated the waters of a cañon and diverted them into a ditch, by means of which he conveyed them to his customers, who used them for hydraulic mining. Defendant subsequently located a mining claim in the cañon, above the head of plaintiff's ditch, and used the water for his operations. He thus caused large quantities of rubbish and sediment to be deposited in plaintiff's reservoirs, thereby lessening their capacity and the value of the water, and entailing additional expense in clearing them out. It was held that plaintiff could recover damages therefor. It made no difference that defendant conducted his operations carefully, so far as to cause as little damage as possible under the circumstances. The rules of the common law remain unchanged, but only the conditions of their application are changed. All the law appli-

cable to the solution of a question of this kind is embraced in the three maxims: *Qui prior est in tempore, potior est in jure ; ubi jus ibi remedium ; sic utere tuo ut alienum non lædas.* "What diminution in quantity, or what deterioration in quality, will injuriously affect the use of the water by the plaintiff, may be safely left to the determination of the jury, guided only by the foregoing maxims. It may be that a slight diminution or deterioration will impair his use of the water, and it may be that such use would not be impaired by a very considerable reduction in quantity or quality. The question must be determined in view of the use to which the water is applied, and the other circumstances developed by the testimony."

McDonald v. Askew, 29, 200 (1865). One who appropriates water to propel machinery does not acquire a property in the water as such, but the right to the momentum of its fall at the point of location, and to the flow of the water in its natural course above.

If one who has so appropriated water conveys all the water of the stream to the owner of a ditch above, he does not thereby lose his prior right to the water which flows down after the sale, and flowing into the stream from tributaries below the ditch, as against one who appropriates the water of the stream below him after his appropriation and before the conveyance. The latter may not, by building a dam, impede the machinery of the former by his backwater.

James v. Williams, 31, 211 (1866). If the owner of a ditch is entitled to all the water of a stream, other parties having ditches on the same stream cannot complain of its enlargement.

Davis v. Gale, 32, 26 (1867). A party acquires a right to a given quantity of water of a stream by appropriation and use, and loses the right by non-use or abandonment. These are the tests of his right, and not the place and character of the use. Having acquired his right by appropriation, he may use the amount of water to which he is entitled at any place, and for any useful and beneficial purpose he may choose. By changing the use he does not affect his right of priority. Where the appropriator who at first used the water to work certain claims, afterwards, when these claims were worked out, extended his ditch and used the water for mining purposes in other localities, this was not a new appropriation. His original right was not altered unless an abandonment intervened.

Nevada Water Co. v. Powell, 34, 109 (1867). Where plaintiff appropriated a portion of the waters of a stream, and diverted it by means of a dam and ditch sufficient for the purpose in the natural condition of the stream as it then existed, it does not necessarily follow that he thereby acquired the right to raise his dam higher and higher, as occasion might require, to obviate obstructions to its use in the manner of its original appropriation, occasioned by physical changes in the condition of the stream, not anticipated, whether arising from natural or artificial causes. Nor does this appropriation by the plaintiff prevent or impair the right of other parties to acquire the surplus water of the stream, or its bed and banks and the adjoining land, to any extent that will not interfere with rights previously acquired. And when the rights of the subsequent appropriator once attach, the prior appropriator cannot encroach upon them by extending his rights beyond the first appropriation.

Plaintiff's dam having been filled up with tailings from mining claims on the stream above, in order to divert the amount of water originally obtained by him, raised his dam and thereby caused water and tailings to flow back on claims of defendants. Defendants, having cut down the addition to the dam, were not liable in damages therefor. The plaintiff had no right to build the addition to the injury of the defendants.

Sawyer, J. : " The fact that subsequent changes occurring in the bed of the stream render it impossible to longer divert the water at the point chosen, without raising the dam, can make no difference. The question is, what was the extent of the plaintiff's right to affect the stream above, by its dam, at the time defendants' claim was located. Whatever was left unappropriated at that time was open to be appropriated by defendants, and if they, by first appropriation, acquired the right to work their claims in their condition at that time, the plaintiff was not authorized, by erecting a higher dam, to interfere with that right." He had his remedy for damages against the parties who had filled the dam and destroyed the use of the water.

Nevada C. & S. C. Co. v. Kidd, 37, 282 (1869). A court of equity will not restrain the diversion of water until the party complaining is in a condition to use it. While the dam and canal of the appropriator are in process of construction, but not yet in a condition to use the water, its use by others is no injury either at law or in equity. The appropriator's right does not exist in such a sense as to enable him to maintain an action either to recover the water or for damages for its diversion.

If he has been ousted from the possession of his dam and canal, an action for damages therefor, and to recover possession thereof, will be an adequate remedy. This is a distinct cause of action from that of an action for damages for diversion of the water, and cannot be joined with it.

Smith v. O'Hara, 43, 371 (1872). If the first appropriator of a stream only appropriates a part, another person may appropriate the residue. The principle is equally applicable whether the appropriation be measured by time or volume. If miners used the waters of a stream in working their claims during the day, and another subsequently turned the water into his ditch on Sundays and nights, the miners acquiescing in such appropriation and use by him, he acquired a right thereto as against them which they could not disturb by diversion.

Stone v. Bumpus, 40, 428 (1870). To sustain an action by one claiming to own a mining claim for damages for maintaining a dam across a cañon, he must show: (1) that he owns the ground claimed by him; (2) that the dam prevented his working it to advantage; and (3) that the defendants had no title to the bed of the cañon, or that their right was acquired subsequently to his, or if prior, that the dam was not needed to enable the defendants to work to advantage.

Stone v. Bumpus, 46, 218 (1873), affirming s. c. 40 Cal. 428. The owner of a claim comprising the bed of a cañon may erect dams across the same, even if thereby mining claims on the banks of the cañon are flooded, provided the claim to the bed of the cañon is the oldest location. In such case a declaration by the owner of the cañon

claim, before building the dam, that he would flood the claim on the bank, is consistent with the utility or necessity of the dam in working the cañon.

Dougherty v. Haggin, 56, 522 (1880). In an action to determine rights to the waters of a creek, the complaint alleged that the plaintiff was entitled to "500 inches measured under a four-inch pressure," and the jury found that he was entitled to "40 inches miners' measurement." This was held uncertain, and a new trial ordered. One inch, according to miners' measurement in one locality, is sometimes a very different quantity from what it is in another locality.

Osgood v. El Dorado W. & D. G. M. Co., 56, 571 (1880). In an action for the diversion of the water of a stream which flowed through land occupied by plaintiff since 1863, but for which he obtained a patent from the United States in 1871, it was shown that defendant's grantor had appropriated the water of a lake, the source of the stream, for a ditch in 1860, but that the principal part of the work of construction was done after 1868, and it was held that the plaintiff's rights as a riparian owner attached when the patent issued, and were subject to the rights of the prior appropriator of the water.

The question whether a person has made a valid appropriation of water depends on whether he gave proper notice of his intention to appropriate it, and if so, whether he prosecuted the work in that behalf with reasonable diligence. If he has done both of these, his right on the completion of that work relates to the date of its commencement.

An appropriator of water who posts a second notice of appropriation after the passage of the acts of 1863 does not thereby abandon his appropriation. Such posting is an assertion of his claim.

Parks Canal & M. Co. v. Hoyt, 57, 44 (1880). McKinsty, J.: "For the purpose of this decision it may be admitted that water acquired by appropriation [to be sold to miners and others] by means of a ditch leading from a natural stream, becomes, after it has passed into the ditch, the personal property of the appropriator. Further, it may be admitted that if water be taken or diverted from the ditch without the consent of the appropriator, he may waive the tort, and bring an action for the value of the water taken. Nevertheless, although such appropriator may be entitled to the flow of the stream undiminished, the water in the stream above his ditch is not his personal property. The stream as yet flows in its natural course—a part of the realty.

"The appropriator certainly does not become the owner of the very body of water until he has acquired control of it in conduits or reservoirs created by art, or applied to the purpose of leading or storing water by artificial means. It follows that he cannot maintain an action for the value of the water as for personal property sold and delivered against one who, without consent, has diverted the stream above the mouth of his ditch."

Himes v. Johnson, 61, 259 (1882). "Where a person diverts the waters of a stream, and uses the same for some useful purpose, he acquires a vested right therein, and if afterwards other persons acquire the ownership or possession of the land, over or through which

said waters flow, from the government or any other person, such ownership or possession of said land is subject to the said water right."

A vested right by appropriation under Rev. Stats. 2339 can be acquired by appropriating the water and constructing a ditch in accordance with the laws and the decisions of the courts of the State. It was not error to refuse to charge that this must be done also in accordance with local customs.

Junkans v. Bergin, 67, 267 (1885). One entitled to divert a quantity of water from a stream may take the same at any point on the stream, and may change the point of diversion at pleasure, provided the rights of others are not injuriously affected by the change. Plaintiff owned two ditches on P. creek, one of which took the water at a point above and the other at a point below, where M. creek, a tributary, flowed into P. creek. Defendant diverted the water of P. creek above, leaving sufficient for plaintiff's first ditch, and after using it turned it into M. creek, so that it flowed into plaintiff's second ditch. This ditch became filled with tailings from defendant's mining operations, and plaintiff, instead of proceeding against defendant for this injury, changed the point of his diversion to a point above the mouth of M. creek, and then sought damages and an injunction for diversion. *Held*, he could not maintain the action.

Frey v. Lowden, 70, 550 (1886). "There is no doubt of the power of a court of equity to ascertain and determine the extent of the rights of property in water flowing in a natural watercourse, acquired by persons who hold and are entitled to them, and to regulate between or among them the use in the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property."

"The capacity of a ditch is a question of fact which does not require for its proof unusual scientific attainments or peculiar skill: it may be established like any other fact, by competent testimony."

Ware v. Walker, 70, 591 (1886). An appropriator of the waters of a natural stream on the public lands has a right as against a subsequent purchaser from the United States to go upon the land of such purchaser above the point of diversion and remove obstructions from the bed of the stream, so as to cause its waters to flow in their natural channel to the point of diversion.

Natoma W. & M. Co. v. Hancock, 101, 42 (1894). A prior appropriator of the water of a stream, who constructs a dam across the bed of the stream for the purpose of raising its surface to a level which will cause it to flow into his ditch, does not thereby acquire such an exclusive right in the bed and banks of the stream as far as the slack water extends above his dam, in the form of a pool or pond, that he can enjoin a subsequent appropriator of the surplus water from tapping the stream and diverting the surplus water at a point above the dam, and below the head of the slack water in the pond, if he does not interfere with the free use and enjoyment of the water right or the property of the prior appropriator.

Such subsequent appropriator cannot be enjoined merely because the nature of his appropriation is such that he can thereby drain the ditch of the prior appropriator, if he disclaims any such intention.

"So long as there is but a single appropriator of water on a stream,

it matters not how imperfect or wasteful may be the means by which he diverts the quantity of water to which he is entitled. No one else is affected, and there is no ground for complaint. But when subsequent appropriators divert the entire surplus at points above him he is required to use all reasonable diligence to husband what is left, and if by such diligence and the use of ordinary means of diversion he can obtain all that he is entitled to, he cannot complain on account of the trouble and expense which it may involve."

While the right of the prior appropriator is carefully protected, he is compelled to exercise it with regard to the rights of others and the paramount interests of the public. The quantity of his lawful appropriation cannot be diminished, but he must return the surplus to the stream without unnecessary waste, and he must use reasonable diligence and reasonably efficient appliances in making his diversion, in order that the surplus may not be rendered unavailable to those who are entitled to it. Upon the same principle it must be held that a prior appropriator, "whose means of diversion become insufficient for his purpose, by reason of their inherent defects, when the surplus is diverted above him, must take the usual and reasonable measures to perfect such means."

Colorado. *Fuller v. Swan River P. M. Co.*, 12, 12 (1888). A prior appropriator of water from a stream may change the point of diversion and the place of use without affecting his right of priority, where no change is made in the quantity of water diverted, and no one is injured by the change. "We think the rule announced in *Kidd v. Laird*, 'that, in the absence of injurious consequences to others, any change which the party chooses to make is legal and proper,' is the only rule under which the rights of the prior appropriator can be fully exercised, and his rights and the rights of all other persons fully protected. The right to change, so limited, includes the point of diversion and the place and character of use."

Ramelli v. Irish, 31 Pac. 41 (1892). A person entitled to the use of water may change the place of diversion, the place where it is to be used, or the use to which it is to be applied (as from irrigation to mining), provided the rights of others are not injuriously affected by such change.

Montana. *Caruthers v. Pemberton*, 1, 111 (1869). The amount of water appropriated by a ditch should be estimated by measuring it according to miners' measurement, near the head of the ditch, when it is full or conveying all it has capacity to do, without overflowing its banks, and not the number of inches it might convey to the place where it is to be used.

Columbia M. Co. v. Holter, 1, 296 (1871). Defendants' grantor in 1865 posted a written notice claiming all the waters of the creek and its tributaries for mining and other purposes, and with due diligence erected a dam and reservoir at the point where the notice was posted, and constructed ditches and flumes from that point to convey the water. In 1867 plaintiff appropriated the water of the creek to operate a mill at a point one and a quarter miles above, but returned it to the creek above defendants' dam and ditches. In 1869 defendants diverted the water at a point above plaintiff's mill.

They had no right as against plaintiff to do this. The notice of the claim of all the water of the creek was of no validity. "An intention to appropriate water to be effectual as against other parties must be carried into actual execution with all reasonable diligence by some known and tangible means and at some designated point. By appropriation a man acquires only the right of possession and user of water, qualified by the right of others to its use in such manner as shall not materially diminish or deteriorate it at the place of his appropriation in quantity or quality. A declaration of a claim to water, unaccompanied by acts of possession, is wholly inoperative as against those who shall legally proceed to acquire a right to the same."

Woolman v. Garringer, 1, 535 (1872). When a notice of appropriation of the water of a stream is posted, and is followed up diligently, subsequent appropriators are charged with notice thereof, and when the ditch is completed the right relates back to its commencement. This right cannot be affected by appropriation by another after the commencement of the ditch, but before the water is turned into it. The prior appropriator has the right to change the place of use, and divert the water to any other place to the extent of his appropriation.

The right acquired by appropriation of waste water from a prior appropriator's mining operations is subordinate to his right. He is not bound to give the subsequent appropriator notice of his intention to reclaim the same. He may determine the right of such appropriator at any time, unless the water had been returned into the original channel after it had been used, without any intention of recapture. In such a case it becomes *publici juris*, subject to appropriation by any one.

Fabian v. Collins, 2, 510 (1876). In an action for an injunction to restrain defendant from diverting water from the plaintiffs' ditch, it is not necessary for the latter to show that their mining claims are not worked out. "It is not necessary for the plaintiffs to show that their mines would pay to work to entitle them to use their own water. They have the right to try and make them pay."

Alder Gulch Con. M. Co. v. Hayes, 6, 31 (1886). In a mining gulch, when water appropriated by a ditch for the purpose of being used upon a mining claim has served its purpose upon such claim, it must be discharged therefrom, for use by the owners of claims below, upon their claims. The owner of the claims below is entitled to the water of the stream flowing down the gulch, subject to the prior appropriation of the water by the owners above for use on their claims, and subject only to reasonable diminution and deterioration by its necessary use thereon. The owner of a claim cannot carry the water which he has diverted and used upon his claim, by means other than the bed of the stream, to another claim owned by him further down the gulch, and thus deprive of the use of the water the claims which intervene, even though all the claims were originally owned by partners.

Ophir S. M. Co. v. Carpenter, 4, 534 (1868). "Where Nevada. any work is necessary to be done to complete the appropriation, the law gives the claimant a reasonable time within which to do it. and although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with

reasonable diligence the right relates to the time when the first step was taken to secure it. If, however, the work be not prosecuted with diligence, the right does not so relate, but generally dates from the time when the work is completed or the appropriation is fully perfected." "The diligence required in cases of this kind is that constancy or steadiness of purpose which is usual with men engaged in like enterprises and who desire a speedy accomplishment of their designs, such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time." Want of diligence will not be excused by the illness of the principal operator, or his want of pecuniary means, or such other accidents as are incident to the person and not to the enterprise. "The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather or the difficulty of obtaining laborers."

Defendant's grantor in 1858 constructed a ditch from the Carson River to Dayton, a distance of four and a half miles. In 1859 and 1860 plaintiff's grantor tapped the river below the Dayton ditch. In 1864 the Dayton ditch was enlarged to ten times its original capacity. This enlargement was contemplated in 1858, but for two and a half years but three months' work was done, consisting of cleaning and enlarging the ditch in places, but not so as to increase its capacity. This was held not to be sufficient diligence to give the enlarged ditch priority over plaintiff.

Proctor v. Jennings, 6, 83 (1870). In 1865 A. appropriated the water of a certain stream to run his mill. Afterwards B. constructed a dam one hundred and fifty-five feet below A.'s mill wheel, which did not, however, interfere with A.'s mill or dam. In 1869 parties owning mining claims above the mill began to work them by a system unknown at the time of building the dams. This system (booming) consisted in alternately checking the flow of the water and then letting it out suddenly at full head, whereby large quantities of tailings were carried down, and settled between the two dams and obstructed A.'s mill wheel. These tailings would have been carried off if B.'s dam had not prevented them. *Held*, B. was not responsible to A. He had a right to appropriate the surplus water subject to A.'s rights, but was not responsible for injuries caused not immediately by his acts of appropriation, but by unforeseen and fortuitous circumstances occurring thereafter, and acting in connection with the means employed by him to appropriate the surplus water.

Ophir S. M. Co. v. Carpenter, 6, 393 (1871). The quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at its smallest point, that is, at the point where the least water can be carried through it.

Vansickle v. Haines, 7, 249 (1872). In 1857 V. diverted the water of a creek for irrigating and domestic purposes, at a point on the public land which in 1864 was patented to H. In 1865 V. obtained a patent for his own land, and in 1867 H. diverted all the water of the creek for his own purposes. He was held to have a right to do so. V. could not restrain him or recover damages. Prior to the patent of H., V. acquired no right as against him which could affect that grant,

for he had no title to affect. Nor could V. acquire any right as against the United States, for as to them he was a trespasser. They granted to H. the soil, and there passed as incident thereto the right to the benefit to be derived from the flow of the water through the land. The common law of riparian ownership, being the law of the State, must prevail where the right to water is based upon the absolute ownership of the soil.

All the acts of Congress up to 1866 clearly show that it has been the policy of the United States "to ignore all rights to or interests in its land, except such as might be acquired by means of its own pre-emption laws or other similar acts expressly conferring or confirming them; in other words, to keep the public land in such condition as that it can give to its patentee an absolute and perfect title, free from all easements and incumbrances of all kinds. No purpose of the general government is more perfectly manifest, from all the legislation of Congress and decisions of its courts, than this. The diversion here complained of cannot then be said to be sanctioned by any policy of the United States. The act of Congress of July, 1866, if it shows anything, shows that no diversion had previously been authorized; for if it had, whence the necessity of passing that act, which appears simply to have been adopted to protect those who at that time were diverting water from its natural channels. Doubtless all patents issued or acquired from the United States since July, 1866, are obtained subject to the rights existing at that time; but this is a different case, for if the appellant has any right to the water, he acquired it by the patent issued to him two years before that time, and with which, therefore, Congress could not interfere." Lewis, C. J.

Speake v. Hamilton, 21, 3 (1890). A person has the right to go upon the public lands and appropriate the waters of a stream for the purposes of mining, milling, or agriculture, and priority of appropriation gives priority of right; the rights of riparian owners, when they attach, are subject to these rights.

"No doubt it had its origin in usage or custom among miners, but that usage has grown to be a part of the public history of the States and Territories where it prevails, and is of such universal application that the courts must take notice of it, and they do that by recognizing and protecting the right." It is, therefore, unnecessary to plead and prove a particular custom.

Defendant had appropriated fifteen inches; plaintiff then appropriated sixty inches; defendant then acquired a homestead on the banks of the stream. He will not be permitted to interfere with plaintiff's taking sixty inches of the water, provided his own fifteen inches are left.

Wimer v. Simmons, 39 Pac. 6 (1895). "The nature of the use for which water is appropriated operates as notice to subsequent appropriators, whether the place of use may or may not be changed. If the purpose for which it is to be applied have the effect to eliminate it from existence, absorb it, use it up absolutely, then it can make no kind of difference to subsequent appropriators in what locality it may be utilized." Placer mining is such a use. Where water is appropriated for placer mining, and is actually used for that purpose for several

years, the place of use may be changed, although thereby a subsequent appropriator is totally deprived of the water which he has been accustomed to use after it had left the ditch of the prior appropriator.

B. Rights of Way for Ditches.

The right to appropriate water would in many instances be vain, without the right to transport it to the appropriator's mines, which may be at any distance from the stream whence the water is taken. The right to appropriate water of the public domain was, therefore, necessarily accompanied by a right of transportation over the unappropriated public domain. A part of the customary system, therefore, was the right to appropriate a right of way for a ditch to transport the water appropriated to the mines where it was to be used. And it was an easy step to extend this right to persons and corporations who had no property in mines or agricultural land, but who appropriated water with the purpose of supplying and conveying it to those who needed it for use in the development of their land or mines. This right is analogous to the other rights of appropriation which we have discussed.

It was exercisable only on the unappropriated public domain, and its validity, when brought in question by others alleging other titles, depended upon priority of appropriation. A ditch or canal to transport water for mining purposes might not interfere with the prior rights of others in the land traversed; and, on the other hand, that land might be subsequently appropriated like any other portion of the public domain, but subject to the prior right of way of the ditch owner.

The method of appropriation is governed by custom, district regulation, or statutory enactment. Usually it consists of staking out the route of the ditch, which must be followed with reasonable diligence by the construction thereof.

The rights of way that were thus established, and theretofore had only existed under the implied license of the government, were recognized and confirmed by the ninth section of the act of Congress of July 26, 1866, and the seventeenth section of the act of July 7, 1870, Rev. Stats. 2339, 2340. These sections confirmed existing rights of way; they acknowledged and confirmed those rights of way previously recognized by the customary law of the public land States, but did not confer a right of way independent

of such customary law. What was before a license, became by reason of the act an unequivocal grant.

In some States the conveyance of water by ditch for mining purposes has been deemed of such importance that vested rights even must yield to it, and the right of eminent domain is conferred on those who construct ditches and canals for these purposes.¹

United States. *Jennison v. Kirk*, 98, 453 (1878). The testator, in constructing a ditch by which to convey the waters of a certain cañon a distance of seventeen miles, to be used for mining, manufacturing and agricultural purposes, and for sale, crossed a gulch, the bed of which had been previously appropriated for mining purposes by the defendant, who mined it by the hydraulic process. The latter, in repairing his ditch, which was thus obstructed, injured the ditch of testator and let the water out of it, whereupon this suit was brought.

Field, J.: "Whilst acknowledging the general wisdom of the regulations of miners as sanctioned by the State and moulded by its courts, and seeking to give titles to possessions acquired under them, it must have occurred to the author [of the act of 1866], as it did to others, that if the title of the United States was conveyed to the holders of mining claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws, and decisions, would be thereby destroyed, unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported in its first clause only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes acquired by priority of possession, when recognized by the local customs, laws, and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes 'is acknowledged and confirmed,' cannot be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States, by the section, said, that whenever rights to the use of water by priority of possession had become vested and are recognized by the local customs, laws, and decisions of the courts, the owners and pos-

¹ Arizona, Act March 21, 1895, p. 94; California, Code Civ. Proc. 1238; Act March 26, 1895, p. 89; Dakota, Comp. L. 1887, ch. 19, art. 3, secs. 2018-2028, 2030; Idaho, Rev. Stats. 1887, sec. 3142; Montana, Pol. Code 1895, secs. 3630-41; Code Civ. Proc. 1895, sec. 2211; Colorado, M. A. S. 3158; see also sec. 3138. Similar statutes have also been enacted in Georgia (Code 1882, art. 7, secs. 742-53, 4623) and North Carolina (Code 1883, secs. 3293-8). *Hand Gold M. Co. v. Parker*, 59 Ga. 419; *Castleberry v. State*, 62 Ga. 442; *White v. Barlow*, 72 Ga. 887; *Imboden v. Etowah & Battle Branch M. Co.*, 70 Ga. 86.

sessors should be protected in them; and that the right of way for ditches and canals incident to such water rights, being recognized in the same manner, should be 'acknowledged and confirmed;' but where ditches subsequently constructed injure by their construction the possession of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws, and decisions of the courts.

"This view of the object and meaning of the ninth section was substantially taken by the Supreme Court of California in the present case; it was adopted at an early day by the Land Department of the government, and the subsequent legislation of Congress respecting the mineral lands is in harmony with it. Letters of Commissioner Wilson of Nov. 23, 1869; Copp's U. S. Mining Decisions, 24; acts of Congress of July 9, 1870, and May 10, 1872, Rev. Stats., tit. 32, ch. 6.

"By the customary law of miners in California, as we understand it, the owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. In the present case, the plaintiff admits that it was incumbent upon the testator or himself to so adjust the crossing of the two ditches that the use of the testator's ditch should not interfere with the prior right of the defendant to the use of the water of the gulch; and it would seem that, so far as the flow of the water was concerned, this was done. Had there been nothing further in the case, the claim of the plaintiff would have been entitled to consideration. But there was much more in the case. The chief value of the water of the gulch was to enable the defendant to work his mining claim by the hydraulic process. The position of the testator's ditch prevented this working, and thus deprived him of this value of the water, and practically destroyed his mining claim. No system of law with which we are acquainted tolerates the use of one's property in this way so as to destroy the property of another. The cutting and washing away of a portion of the testator's ditch by the defendant, this having been done 'in the exercise, use, and enjoyment of his own water rights, in the usual and in a reasonable manner,' as found by the court, and in order that his claim might be worked as before, was not, therefore, an injury for which damages could be recovered."

Broder v. Natoma W. Co., 101, 274 (1879), affirming s. c. 50 Cal. 621 (1875). In 1853 defendant constructed a ditch for the purpose of distributing water for mining, agricultural, and other uses. This ditch continued in constant and successful operation, and, the trial court found, had been uniformly acknowledged and recognized by the local customs, laws, and decisions of the courts of California, and the land covered thereby was indispensable to the use of the ditch. Two quarter sections of this land were pre-empted by the plaintiff and his grantor, the declaratory statements being filed Aug. 6, 1866, and Sept. 14, 1866, and patents subsequently issued. The plain-

tiff's title to this land was held to be subject to the defendant's right of way. The ninth section of the act of July 26, 1866, was as to defendant's ditch, so far as it ran at that date through lands of the United States, an unequivocal grant of the right of way, if no more. Two other quarter sections through which the ditch ran were included in a grant to the Central Pacific Railroad, from whom plaintiff acquired title. The right of defendant to maintain his ditch was held to be a "lawful claim" within the meaning of sec. 4, act of July 2, 1864, and consequently excepted from the grant to the railroad.

And "it is the established doctrine of this court that rights of miners who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations . . . in the region where such artificial use of the water was an absolute necessity, are rights which the government had by its conduct recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of opinion that the section [nine] of the act . . . was rather a voluntary recognition of a pre-existing right of possession constituting a valid claim to its continued use, than the establishment of a new one."

Bybee v. Oregon & Cal. R. Co., 139, 663 (1891). Under the act of July 26, 1866, no right could be acquired to any portion of the public lands until the actual taking possession of the same for the purpose of constructing a ditch.

Burdge v. Underwood, 6, 45 (1856). The owner of a California mining claim cannot dig a canal through land occupied by another for grazing purposes, to carry water to the place of his operations, the mining claim not being upon the grazer's land. The statute making the possessory rights of settlers of public lands for agricultural or grazing purposes yield to the right of miners cannot be extended by implication to a class of cases not specially provided for.

Conger v. Weaver, 6, 548 (1856). The right to construct ditches, canals and flumes for the purpose of conducting water for mining purposes is a right similar to the right to dig for gold, and is acquired in the same way. It is a franchise; the attending circumstances raise the presumption of a general grant from the sovereign of the privilege, and every one who wishes to attain it has license from the State to do so, provided the prior rights of others are not interrupted. The survey of the ground, planting stakes along the line, giving public notice, and actually commencing and diligently pursuing the work, is such possession as the nature of the subject will permit, and is conclusive of the right. One who subsequently encloses land on the route of a ditch so laid out takes subject to the right of the ditch owner, although the ditch is not completed. A slight divergence in the construction of the ditch from the line originally laid out after plaintiff had located and appropriated a claim on the land was no trespass, and if there was no actual injury caused by the change, it was *damnum absque injuria*.

Parke v. Kilham, 8, 77 (1857). The line upon which a ditch is actually intended to be dug should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch owners date back to the survey.

Weimer v. Lowery, 11, 104 (1858). A ditch company has not the right to construct its ditch through the enclosure of another on which he has his family residence and cultivates a garden and orchard. *Burdge v. Underwood*, 6 Cal. 45, followed.

Clark v. Willett, 35, 534 (1868). Where one has a right of way for a ditch on the surface of land, and another a right to mine beneath the surface, these rights are not necessarily incompatible. In such a case the maxim *qui prior est in tempore, potior est in jure* is not of controlling weight, but the maxim *sic utere tuo ut alienum non laedas* prevails.

Whether ditch property in the mineral regions, although conceded to be real estate, is in equity to be regarded with the same measure of favor as the land which is held and cherished by the owner for itself, is doubted.

Correa v. Frietas, 42, 339 (1871). Defendants owned and held an hydraulic claim, into which their flume emptied, and plaintiff owning a claim below dug a ditch, commencing on defendants' land below the flume, for the purpose of appropriating the water discharged therefrom. Defendants then extended their flume further down their own claim, so as to prevent this appropriation. The defendants had a right to do so whether it served a useful purpose or not, and plaintiff could not have the extension abated as a nuisance. In the absence of some custom which would restrict their right of possession, they ought not to be deprived of that right because another may be able to convince a jury that such extension is not really beneficial to the working of their mine. The owner and possessor of a mining claim on public land has a right to prevent any subsequent comer from erecting or constructing any superstructure, cut or ditch on his claim, unless the right to construct the same is given by some mining custom or regulation.

Bliss v. Kingdom, 46, 651 (1873). Act of April 1, 1870, providing for the condemnation of the right of way over or through a mining claim for ditches, tunnels, flumes, etc., necessary for the convenient working of another claim, is cumulative, and does not have the effect of excluding a party from enforcing the right to construct such tunnels, ditches, flumes, etc., in the manner authorized by local customs, when that right exists by local customs independent of the statute.

Reynolds v. Hosmer, 51, 203 (1876). The lower section of a ditch having been sold as a separate structure from the upper section, there is no legal duty upon the part of the owner of the upper section to permit the water brought by the upper to flow into the lower section, and the value of the water should not be considered in fixing the value of the lower section.

Titcomb v. Kirk, 51, 288 (1876). A ditch owner may not construct his ditch over a mining claim of prior location.

The purpose of the acts of Congress of July 26, 1866, July 9, 1870, and May 10, 1872, is, taken together, to recognize in and confirm to the respective classes of licensees therein mentioned the same rights which were accorded to them by the State courts prior to the passage of the acts. There is nothing in the ninth section of the act of 1866 changing the rule first stated.

Cummings v. Peters, 56, 593 (1880). Sec. 1238, Code Civ. Proc.,

provides, "Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses. . . . Subdiv. 4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads, steam and horse rail-roads, canals, ditches, flumes, aqueducts and pipes for public transportation supplying mines and farming neighborhoods with water," etc. Art. XIV. sec. 1, of the Constitution, declares, "The use of water now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner to be prescribed by law." In proceedings to condemn a strip of land for a ditch, a complaint alleging that the uses for which the water is intended and designed are mining, irrigation, manufacturing, household and domestic purposes; that the line of the ditch had been surveyed and located; that along that line there are valuable mining claims, undeveloped mining lands, and agricultural land; that these cannot be worked, developed or cultivated without water brought to them by artificial means; that the ditch is designed to accomplish this purpose, and that it is a public use and the taking of the land in question is necessary thereto, — such a complaint brings the case within the above statutory and constitutional provisions. If these allegations are all proven, there is a public use.

Farley v. Spring Valley M. & I. Co., 58, 142 (1881). Plaintiff settled as a pre-emptor on a tract of land, and on Feb. 27, 1871, filed his declaratory statement. In 1877 he proved up and paid for the land, and in 1879 received his patent. Defendant, after the filing of plaintiff's declaratory statement, built a reservoir, whereby a part of this tract was flooded. In an action for damages therefor, plaintiff was nonsuited. The tract claimed by him was public land until he had proved up his claim and paid therefor. Until then Congress had full power to withdraw it from sale or grant it to another. The ninth section of the act of July 26, 1866, and the amendatory act of July 9, 1870, had this effect. Under them the defendant acquired the right to construct and use his reservoir on the public lands, and this right was excepted in plaintiff's patent.

Lorenz v. Jacob, 63, 73 (1883). Right of eminent domain under sec. 1238, Code of Civ. Proc., cannot be exercised in favor of the owner of mining claims, to enable him to obtain water for use in working his claims, although the intention may be to supply others with water for mining and irrigating purposes, this being a pretence, while the main purpose was the private use.

Lorenz v. Waddron, 96, 243 (1892). Owners of a ditch on the public lands are entitled to a right of way, with vertical and lateral support for it. The owner of a mining claim located across it, subject to these rights, may mine his claim in any manner he may select. The ditch owner may not enjoin him from tunnelling beneath the ditch where no reasonable probability appears that the ditch will be injured by the excavation.

Where land has been located as a mining claim, only the United States, or persons claiming the land under them as non-mineral, can raise the question whether the land was subject to location as a mining claim.

Jacob v. Lorenz, 98, 332 (1893). It is not necessary that a water right should have vested prior to July 26, 1866, in order that it may be protected by Rev. Stats. 2339, 2340. They protect a ditch whose owner's rights accrued after the passage of the act, but before the patent of mineral lands crossed by it.

An objection that the water right is not appurtenant to the ditch in question is not sound. "It is immaterial in what ditch this water was taken when he acquired the right. The place of diversion or of use, or the purpose to which the use was applied, could be changed." "The water is the principal thing, and if either was appurtenant to the other, the ditch is appurtenant to the water right; and as the water may be taken through any ditch, the question becomes unimportant."

Rockwell v. Graham, 9, 36 (1885). A right of way for a flume to conduct water is an easement which is protected by the provision of Rev. Stats. 2339, 2340, and is not ground for an adverse claim to land for which application has been made for patent as a placer mining claim.

Noteware v. Sterns, 1, 311 (1871). Rev. Stats. 2339 does not authorize one person to go at his pleasure on the mining ground of another, without the latter's consent, and construct over or through the same a ditch or canal which would greatly damage or almost destroy the vested rights of the owner, without showing a necessity therefor, and paying or securing the damage to result therefrom.

Hobart v. Ford, 6, 77 (1870). Rev. Stats. 2339 grants the right of way over the public land to all who may desire to construct ditches or canals for mining or agricultural purposes. Under this "nothing is necessary to be shown except that the construction of a canal or ditch is desired for some mining or agricultural purpose, and that the land over which it is to be constructed is public. These facts are shown in the complaint alleging the building of the ditch or flume for certain mining purposes; that the land claimed by the defendants is public land; that it is necessary to construct the ditch over it, and that he unlawfully obstructs and prevents its construction over the premises claimed by him." There is no question here of taking private property either for public or private use. The land claimed by defendant is public land over which the general government has absolute control.

Shoemaker v. Hatch, 13, 261 (1878). A. constructed a ditch on public land which B. had already applied to the State of Nevada to purchase, in accordance with the provisions of the act of 1871 to provide for the selection and sale of lands granted by the United States to Nevada; but the State agents had not yet made the selection. A. was held not to be responsible in damages to B. under the act of Congress of July 26, 1866.

Rivers v. Burbank, 13, 398 (1878). Where defendant enters and constructs a ditch upon public land in the possession of plaintiff, upon which he resides and which he cultivates, but title to which he has taken no steps to acquire from the government, the defendant has, under Rev. Stats. 2339, the right of way for the construction of his ditch subject only to the liability of paying for damages to plaintiff's possession.

Dodge v. Marden, 7, 456 (1879). Where a patent issues for land, reserving water rights mentioned in Rev. Stats. 2339, the claimant of such rights continues to own them.

C. Injuries by Manner of constructing or operating Ditches.

The owner of a ditch is liable for such injuries as are occasioned by his negligence in the construction or operation of his ditch. The ordinary rules of the law of negligence and trespass are applicable.¹ The settler on the public domain is particularly protected by the last clause of Rev. Stats. 2339.²

Tenny v. Miners' Ditch Co., 7, 335 (1857). Ditch owners are liable for injuries caused to a mining claim by the breaking of their ditch, if caused by wanton or gross negligence, but not if it was a mere accident where no negligence was shown, and the owner of the claim located along the line of the ditch subsequent to its construction.

Hoffman v. Tuolumne County W. Co., 10, 413 (1858). In an action by the owner of a mining claim for damages against a ditch company for injuries caused by the breaking of a dam and the flooding of the claim, wherein plaintiff alleged that the dam was, by reason of defective construction, insufficient for its purpose, and by reason of carelessness and mismanagement broke, etc., it was error to charge that if "the dam was improperly or inartificially constructed, or defendants could have constructed it in a better or more substantial manner so as to prevent its breaking, then they are liable." "The question is not what the plaintiffs could have done, but what discreet and prudent men should or ordinarily do in such cases where their own interests are to be affected and all the risk their own."

Wolf v. St. Louis Independent W. Co., 10, 541 (1858). The owner of a ditch is bound to use that care and caution in constructing and maintaining it which an ordinarily prudent man would use if all the risk were his own. The degree of care required of him is not affected by the question of priority.

Wolf v. St. Louis Independent W. Co., 15, 319 (1860). In an action for damages for injury to plaintiffs' mining claims by overflowing water from defendant's flume, the fact that plaintiffs could have prevented the injury by pulling a board from the flume above his claim, thus diverting the water, is no defence. They could have done so only by the commission of a trespass, and they are not to be denied redress because they chose to appeal to the law rather than violate it.

Everett v. Hydraulic Flume T. Co., 23, 225 (1863). If a dam constructed in a good and workmanlike manner, and with that reasonable care and diligence which prudent men would have used, breaks at a high stage of water, without negligence on the part of the owner, and injures mining claims below, he is not liable for the injury.

Richardson v. Kier, 34, 63 (1867). Where a natural ravine is adopted

¹ Dakota Comp. L. 1887, ch. 19, art. 4, sec. 2034.

² See *Jennison v. Kirk*, ante, p.660.

as part of the course of a ditch, the ditch owner is not responsible for an overflow of water naturally running therein, but he is responsible for the overflow resulting from his use of the ravine for the purposes of a ditch.

He cannot shield himself from responsibility by the fact that he has sold the water to miners who used it for mining purposes, if the water was delivered to them at a point from which it would unavoidably run into the ravine and cause the injury complained of.

Campbell v. Bear River & Auburn W. & M. Co., 35, 679 (1868). In an action for injury to land by reason of alleged careless management of defendant's ditch which traversed it, it was not error to refuse to charge the jury that the defendant was liable unless the damage was "the result of inevitable accident, and not from any mixture of fault or negligence on the part of the defendant, either in the construction, care, or keeping of its ditch." The correct principle is "that, in order to avoid doing a damage to the property of another, a person is bound in law to such care in the use of his own property as a prudent man would employ under similar circumstances, if he were himself the owner of the property exposed to damage." If defendant had a right to run his ditch over plaintiff's land, he is not bound to any higher degree of care by the fact that plaintiff's appropriation was prior in time.

D. *Transfer of Title to Water Rights.*

Generally speaking, these rights, and the rights of way and canals by which they are utilized, are alienable as real estate. For purpose of conveyancing, they are treated as real estate.¹

The right is not inseparably connected with the land for whose benefit the water was appropriated, but may be conveyed separate and apart therefrom. The right to the water and the right to the structure through which it is conveyed are distinct. The latter is not an easement; it is land: consequently is not an appurtenance of a mining claim. But the water right may pass as a part of the improvements of the land, and when the land is held by possessory right that may be conveyed verbally, the water right passes as an appurtenance thereof.²

Title to water rights may be acquired by prescription by continuous, notorious, exclusive, adverse possession during the period of limitation of actions as to real estate.

California. *Ortman v. Dixon*, 13, 33 (1859). A water right in equity may be conveyed by instrument under seal. And this equitable title, if accompanied by possession, is sufficient to give a right of possession.

¹ Colorado, Laws 1893, p. 298; M. A. S. Supp. 427 a; Oregon, Hill's Ann. Laws, 1892, secs. 3833, 3834.

² *Hindman v. Risor*, 21 Oreg. 112.

Union Water Co. v. Murphy's Flat F. Co., 22, 620 (1863). A mortgage upon a mining ditch in course of construction, and purporting to grant not only the ditch as it stood, but as it should be when completed, is valid as against the entire ditch. The mortgaged property was in the nature of real estate, and the mortgage, without any special provision, would include all improvements and fixtures then on the line located for the ditch, as well as those which might thereafter be put thereon.

Reed v. Spicer, 27, 57 (1864). A deed conveying a right of way in a ditch, or for an existing ditch, is a conveyance of the ditch.

Union Water Co. v. Crary, 25, 504 (1864). The rights of the first appropriator of water may be held, granted, abandoned, or lost by the same means as rights of the same character issuing out of lands to which a private title exists. They may be lost in whole or part by the adverse possession of another. When such a person has had continued, uninterrupted and adverse enjoyment of the watercourse, or of some portion of it, during the period limited by the statute of limitation for entry upon lands, the law will presume a grant of the right so held and enjoyed by him.

American Co. v. Bradford, 27, 360 (1865). The use of water in any particular way for a period corresponding to the time limited by statute within which an action must be commenced to determine the right to it, raises a presumption of title in the person enjoying the same as against a right in any other person which might have been, but was not, asserted; but to make this presumption conclusive, the right to the use of the water must have been asserted under a claim of title to the knowledge of the person having the prior right, and must have been uninterrupted.

McDonald v. Askeu, 29, 200 (1865). If one who has appropriated water conveys all the water of the stream to the owner of a ditch above, he does not thereby lose his prior right to the water which flows down after the sale, and to the water flowing into the stream from tributaries below the ditch, as against one who appropriates the water of the stream below him, after his appropriation and before the conveyance.

Davis v. Gale, 32, 26 (1867). If a subsequent appropriator diverts the water of the stream so as to deprive the prior appropriator of it, or a part thereof, and holds adverse possession for the period of the Statute of Limitations in regard to real estate, he acquires a right thereto by force of user as against the prior appropriator. This right is not prejudiced by the fact that he has allowed a certain quantity of water to pass his ditch for the use of miners at work below, who are unconnected with the prior appropriator.

Campbell v. West, 44, 646 (1872). The right to maintain a ditch constructed upon the land of another may be acquired by prescription, by continuous possession, open, notorious, exclusive, and known to the owners of the land during the period of limitation of actions for entry upon lands.

Hungarian Hill Gravel M. Co. v. Moses, 58, 168 (1881). G., being the owner of certain mining claims and appurtenant ditches and water rights, mortgaged them. Subsequently he built a new ditch and

reservoir, by which he conducted to his land the waters of a creek which he had before utilized by one of the old ditches which he now abandoned. He then sold these claims, and another, together with the new ditch and water rights appurtenant, subject to the mortgage. *Held*, the mortgage covered the new ditch, which was constructed for the purpose of employing to better advantage water rights which were covered by the mortgage.

Montana. Donnel v. Humphreys, 1, 518 (1872). Defendant conveyed to plaintiff, by deed, "the ditches known as the Silver Bow Ditch Co.'s ditch; said ditches carrying water from Silver Bow creek to Butte City, etc., and more particularly known as the Humphreys and Allison ditches," together with appurtenances. Defendants subsequently diverted water from the Park ditch. Plaintiff, claiming that this passed to him by the deed, brought suit, whereat he offered parol evidence to prove that the Park ditch was one of the H. and A. ditches, that it was the feeder of the two other ditches that made up the system, and that at the time of the conveyance plaintiff took possession of it, and its waters could then only be used through the other ditch. This was admissible to show that Park ditch was part of the subject of the conveyance, but not that it was an appurtenance. "Things in their nature equal and of like character and grade can never be appurtenant to each other, for the common as well as the legal meaning of the word implies inferiority and dependence, so that a water ditch could never become appurtenant to another ditch of like character, and pass as an incident thereto."

Barkley v. Tieleke, 2, 59 (1874). A ditch or water right "is such a species of realty as to require for its transfer the same form and solemnity as the conveyance of any other real estate."

If the owner of a ditch attempts to convey the same by an insufficient deed, but places the grantee in possession, and the latter continues its operation, this operates as an abandonment by the grantor and a new appropriation by the grantee dating from the change of possession.

Fabian v. Collins, 3, 215 (1878). A license for the diversion of water from a stream in a gulch during the time the licensors did not require the same in the gulch, is not a conveyance of an interest in lands, but is a personal interest, limited to the original parties, and not binding on the grantees of the licensor.

Oregon. Wimer v. Simmons, 39 Pac. 6 (1895). Where plaintiffs and defendants were appropriators of water for mining purposes, and the water from defendants' ditch was discharged into the stream just above the head of plaintiffs' ditch, the fact that plaintiffs used the water so escaping for fourteen years without interference by defendants does not create a right to use the same by prescription. The use was not adverse, but was by the indulgence or sufferance of the defendants.

E. Abandonment of Water Rights.

The right to water acquired by appropriation, like the property in mining land acquired in the same way, may be lost by aban-

donment. This is a desertion accompanied by an intention not to resume possession. This intention is the gist of abandonment. It may be established in a variety of ways, chiefly by inference from the acts and declarations of the party charged therewith, but will not be presumed from mere lapse of time or non-user.¹

It is not an abandonment of water to conduct it into a natural channel, whether a dry ravine or a running stream, instead of an artificial ditch or channel, if the purpose is to use the channel to conduct it to a particular place. An abandonment takes place in such a case only when the water is turned into the natural channel with the intention of surrendering the use of it, and that it should become *publici juris*, or where it is allowed by its owner to find its way into such channels without his agency.

The posting of a second notice of appropriation is not an abandonment, but an assertion of a claim to the water.

Where water has been abandoned by its owner, he may resume possession of it, provided others have not in the mean time appropriated it. As in the case of mining claims, an attempt to convey water by an insufficient instrument, followed by possession by the grantee, has been treated as an abandonment by the grantor and a new appropriation by the grantee.

California. *Eddy v. Simpson*, 3, 249 (1853). See this case on page 644, *ante*.

Hoffman v. Stone, 7, 46 (1857). A ditch company who avail themselves of a dry ravine to conduct their water a portion of the way to their dam where they use it, do not abandon the water so carried into the ravine. They are entitled to the same enjoyment of it as if conducted through an artificial ditch. They cannot be enjoined by a prior appropriator of land along the ravine from diverting their water from the ravine, so long as they do not divert the water naturally flowing therein.

Partridge v. McKinney, 10, 181 (1858), affirmed in s. c. 13, 158 (1859). The law will not presume an abandonment of property in a dam and mining ditch for mining purposes from a lapse of time.

Butte C. & D. Co. v. Vaughn, 11, 143 (1858). See this case on page 647, *ante*.

Dougherty v. Creary, 30, 290 (1866). See this case on page 609, *ante*.

Davis v. Gale, 32, 26 (1867). "The fact that the water was appropriated solely for a special and particular purpose, and the further fact that that purpose had been fully accomplished, and the further fact that the parties concerned in it had dispersed to other parts, and that more

¹ But see Dakota Comp. L. 1887, ch. 19, art. 4, secs. 2035, 2038.

than two years were allowed to pass without their giving any attention to the ditch, and then only to make a sale of it to others at the nominal price of twenty-five dollars, all bear directly on" the question of abandonment. In view of these facts a jury might find abandonment, in which event the sale, whether in good faith or not, would not revive, as against intervening rights, the rights acquired by the first appropriation.

Osgood v. El Dorado W. & D. G. M. Co., 56, 571 (1880). An appropriator of water who posts a second notice of appropriation after the passage of the act of 1863 does not thereby abandon his appropriation. Such posting is an assertion of his claim.

Kirman v. Hunnewell, 93, 519 (1892). After a ditch by which the water of a creek was appropriated for mining purposes has fallen into disuse and has been abandoned, the water right is destroyed by the abandonment; and where, after such abandonment, the water of the creek has continuously flowed over lands belonging to a riparian owner, and been used by him for irrigation and for domestic and farming purposes for many years, no person claiming under the appropriation can revive the old water right so as to divert the water beyond the watershed of the creek, to the injury of the riparian owner.

Barkley v. Tieleke, 2, 59 (1874). If the owner of a ditch attempts to convey the same by an insufficient deed, but places the grantee in possession, and the latter continues its operation, this operates as an abandonment by the grantor and a new appropriation by the grantee, dating from the change of possession.

Dodge v. Marden, 7, 456 (1879). Where a patent issues for land, reserving water rights mentioned in Rev. Stats. 2339, the claimant of such rights continues to own them. His rights, however, may be lost by abandonment, but not by mere non-user short of the period of the Statute of Limitations as to real property.

An abandonment is a desertion, but it must be accompanied by an intention not to take up the possession again. It may be inferred from the declarations and acts of the party charged with it. This is the meaning of the word as used in section 7 of the Oregon statute relating to mines and mining claims. The sale of mining claims which might have been worked by water from the claimant's ditch is not an abandonment of the water right.

Wimer v. Simmons, 39 Pac. 6 (1895). "There can be no abandonment without some action of the will and an intent to abandon, but such intent may be inferred from the acts and declarations of the party against whom the relinquishment is claimed. Time is not, however, an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete."

A ditch by which water was appropriated for mining was filled up at a certain point, by permission of the owners, with debris from a mine, but under an agreement that the mine owners should reopen the ditch upon request. The ditch was not used beyond that point for fourteen years, but water was actually used in the rest of it during that time. The appropriators rejected several propositions to reopen the ditch and furnish water to persons beyond the point of obstruc-

tion, because it would not pay them. They frequently spoke of the ditch as theirs, protected it from destruction, and refused to sell it. It was *held* that there was not an abandonment.

II. SUBTERRANEAN STREAMS AND PERCOLATIONS.

The owner of minerals or mining lands may interfere with the course of subterranean waters, provided it is necessary in the course of his mining operations, and he has acted without negligence or malice. In such a case, whatever injury may have been caused to the springs or watercourses of neighboring or of surface owners is *damnum absque injuria*. Springs upon the lands of another may thus be totally destroyed without creating a legal injury. If, however, the destruction or injury is caused with malice or by negligence, the owner of the spring is entitled to damages. And where the spring that has been destroyed owes its source to a distinct watercourse, whose existence is known to the mine owner, or to percolations which his knowledge of the geological formation of the land would cause a reasonable expectation that he would disturb by his operation, and if in addition to this knowledge it appears that he, by reasonable precautions in ordinary use, and without material detriment to himself, might have preserved the watercourse or percolations from injury or diversion and the spring from contamination or destruction, his failure to do so is negligence.

New York. *Ellis v. Duncan*, 21 Barb. 230 (1855). The owner of a farm may open and work a quarry upon it, although by doing so he intercepts one of the underground sources of a spring on his neighbor's land, which supplies a stream flowing partly through the land of each, and thereby diminishes the supply of water to his neighbor's injury. Men are presumed to acquire title to land with a full knowledge of what is visible, and of the rights which result therefrom, but they cannot be supposed to acquiesce in an appropriation of streams of whose existence they are not generally aware.

Pennsylvania. *Wheatley v. Baugh*, 25, 528 (1855). The owner of land who, in the use of his property for mining purposes, interferes with the subterranean flow of water and thus destroys a spring on his neighbor's land, is not liable for the damages thus done unless he is guilty of malice or negligence.

Maguire v. Howard, 40, 391 (1861). The owner of coal land on which were a dwelling and a well of water, having sold the coal, afterwards sold the surface, part of the purchase money being secured by bonds and mortgages. In the bonds it was provided that the purchasers were "bound for the sinking of a well below the coal, or otherwise to obtain water for family purposes, provided the same be

necessary by reason of failure of water in the well then dug within two years." The failure of the water within the time, the neglect of the vendor to make it deeper or dig another, and the expenditure by the vendee in sinking the well of an amount greater than the amount of the only bond remaining unpaid, discharges the latter from the payment of the bond. The condition of the bond was a guarantee by the vendor that the water would not fail, whether by natural means or by the mining of coal. For though the vendee knew of the grant of the coal to another, so, also, did the grantor in accepting the bond.

An offer by the vendor to dig a new well at the outcrop of the coal, several hundred feet from and much lower than the house, so that the water would be useless for family purposes, was not a compliance with the condition of the bond.

Haldeman v. Bruckhart, 45, 514 (1863). An owner of land, who in mining upon it drains off water and interferes with its subterranean flow either in a well defined stream or by percolation, and thereby destroys a spring on the land of an adjoining owner, is not, in the absence of malice and negligence, liable in damages therefor.

Coleman v. Chadwick, 80, 81 (1875). The owner of the surface cannot recover for the loss of springs occasioned by the ordinary operation of mining by the owner of the substrata.

Trout v. McDonald, 83, 144 (1876). Destruction of a spring belonging to the surface owner, if a necessary incident to mining, is *damnum absque injuria*.

Gumbert v. Kilgore, 6 Cent. Rep. 406 (1886). See this case on page 683, *post*.

Collins v. Chartiers Valley Gas Co., 131, 143 (1890). The rule that for unavoidable damage to another's land, in the lawful use of one's own, no action can be maintained, does not exempt a land owner from all obligations to pay regard to the effect of his operations on subterranean waters. The distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location and course; in either case the rule of *damnum absque injuria* applies only in the absence of negligence. If a person boring for oil or gas have knowledge that neighboring water wells are supplied from a stratum of clear water underlying his land, and that there is a deeper stratum of salt water likely to rise and mingle with the fresh, when penetrated in such boring, and may prevent this mingling by a reasonable outlay, his failure to use the means available therefor is negligence.

Collins v. Chartiers Valley Gas Co., 139, 111 (1891); s. c. as 131, 143, which is followed here. The rule there stated is not confined to actual knowledge of the particular subterranean stream of water. The defendant is liable where his knowledge of the general geological formation was such as to cause a reasonable expectation that the working would cause a commingling of salt water with fresh water, which in its percolation supplied the wells of the neighborhood.

"The question in this case relates not to the right, but to the manner of its exercise. The defendant had a right to drill in search of natural gas, but it was bound to exercise this right in a reasonable

manner, and with due regard to the rights of others. In its search for gas it had to drill through nearly two thousand feet of the earth's crust, with its successive layers or strata of rock, gravel, slate, and other substances, and their veins of water, fresh and salt. In the ordinary course of drilling, these veins of water had to be cased out of the well, and the jury have found on abundant evidence that at a small additional expense, by a process well known and easily applied, and in more or less frequent use throughout the oil and gas districts of Pennsylvania, they might have been kept from mingling, and the wells in the neighborhood saved thereby. If so, then the maxim *sic utere tuo ut alienum non lædas* applies, and the defendant is liable, not because it has necessarily injured the plaintiffs in the exercise of its own legal right, but because it has injured them unnecessarily by the neglect of such reasonable precautions as might and should have been taken to protect them. According to the testimony, this gas well was drilled with the knowledge of the fact that salt water was to be encountered; that it could be confined to its own bed; that, if it was not, the 'whole neighborhood would be spoiled,' and that there were many wells near by in the borough of Glenfield to be affected by their care or want of it in this particular. Yet no effort whatever was made to shut off the salt water, or to avoid the destruction of the wells which it was practicable to save. The ground of the defendant's liability is negligence, the want of reasonable care, under the circumstances, for the rights of others."

The drilling here was done by a contractor, who was not required by his contract to use any of the appliances usual and necessary to prevent the pollution of water. The contract contained, as to this matter, the clause, "All springs to be fully protected from damage, and drillings to be carried from the wells to such point as will do the least damage to property possible." This the court below charged did not relieve the gas company of responsibility, as the contractor was not required to shut off the salt water from the fresh so as to protect it. This was assigned as error in the court above, but the judgment was affirmed without mention of this point.

CHAPTER XXI.

RIGHTS OF SURFACE AND LATERAL SUPPORT.

I. Surface Support.

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II. Lateral Support.

I. SURFACE SUPPORT.

WHERE there has been a horizontal division of the land, the owner of each subjacent estate owes to the owner of the superincumbent estate the support of his land in its natural condition, and the owner of the superincumbent estate has conversely a right to this support. This is an absolute proprietary right, necessarily arising out of the ownership of the surface, and not an easement depending upon a grant.

The mine owner in taking out his minerals must leave sufficient support for the superincumbent land. This he may do by leaving ribs or pillars, or by constructing artificial supports. If he fails to do this and the land sinks, he is liable for the damage that occurs to the surface owner by reason thereof, and he may be enjoined from the further removal of minerals.

Whether the mine owner has worked his mine skilfully or negligently does not affect the existence of the right to surface support. The right is absolute, and causing the subsidence of the surface by mining beneath it is negligence, however carefully or in accordance with usual practice the operation may have been conducted. The owner of the minerals has a right to so much only as he can take out without injury to the surface. In an Iowa case the right to surface support was held to depend upon want of ordinary care in the removal of the minerals; but this is at variance with authority and reason, and the general rule has been subsequently correctly stated in that State. The surface owner's right is likewise unaffected by his knowledge of the state of the mines or the method of working them, nor can it be controlled by a custom to take out all the minerals without provision for support.

Though the right of surface support is absolute, yet the subjacent owner may be relieved of the corresponding obligation by a release from the surface owner, or by the terms of the instrument creating his estate. But upon him who thus attempts to control the rule of law, lies the burden of proof. To destroy or injure the surface, there must exist some statutory or contract authority. The intention to part with the right of surface support must appear by plain and explicit language in the grant of the minerals, or by an express exception from a reservation of them. It may not be taken away by mere implication from language not necessarily importing such a result. It is not accomplished by a grant or reservation of all the minerals under the land, or of all the privileges necessary to their convenient working; nor do special provisions as to support relieve the mine owner from any further duty toward the surface owner. The immunity gained to the owner of minerals by an express covenant extends to his lessee. And such a release is binding upon the grantor and those taking title under him, but not upon the State or its grantee entering by right of eminent domain. But where recorded articles of agreement to sell the minerals do not contain such a release of the obligation to furnish support for the surface, purchasers of the surface are affected only with the notice of what was recorded, and not with a provision in a subsequent unrecorded deed absolving the mine owner from this duty, and they consequently are not bound by the latter.

The mine owner cannot be relieved of his obligation by parol evidence that at the time of the grant the grantor told him that the mining of the coal would let the surface down.

The surface owner's right is to the actual support of the land in its natural condition. It does not extend to the support of buildings erected upon the surface, and the mine owner may mine so that the buildings fall, provided his mining would not have injured the surface in its natural state. On the other hand, the mere presence of buildings does not prevent a recovery for injury to the surface, unless it be shown that the subsidence was due to their presence; but the presumption is that the removal of the minerals caused the subsidence. If this is the case, if the surface has subsided because of the mine owner's failure to furnish sufficient support to keep it in its natural condition, he is liable for injury to ordinary buildings that may have been erected on the surface —

indeed for every injurious effect the whole surface estate may have suffered from the falling in or cracking of the surface. The statement in *Jones v. Wagner*, 66 Pa. 429, that the right of surface support extended to reasonable buildings is not borne out by the authorities. But the right to support of structures upon the surface may be acquired like any other easement by grant, express or implied. In America it would seem that such a right cannot be acquired by prescription.¹

A railroad or pipe line company having a right of way over mineral lands is entitled to support of the surface of its right of way, its road and rolling-stock, or pipe lines, and at its suit the owner of the minerals will be enjoined from mining thereunder. If the railroad was there at the time he acquired his estate, he took subject to this right, and could not hold his grantor in damages for the loss by reason of his being prevented from taking out the minerals needed to support the railroad. When the right of way is acquired by right of eminent domain, the value of the minerals in place which must be left to support the railroad or pipe line will be included in the damages. But the company is not bound to take this servitude, and may release the owner of the land, or of the minerals, as the case may be, from the burden, in which case damages will not be paid therefor, and he may mine and remove the mineral as freely and fully as if no entry had been made. If, then, the company, in disregard of its contract, should enjoin the mine owner from removing the minerals, it would be liable in damages for breach of its contract, and the measure of damages would be the value of the mineral left standing.

The same principles as to surface support are applicable to a lease of minerals as to a grant thereof. It is a presumption of law that, in the absence of expressions of a contrary import, the lessor reserves to himself a right of surface support. This presumption is not negated by the fact that the rent is determined by the amount of mineral taken out.

The same principles, *mutatis mutandis*, likewise hold between the owners of different minerals or different veins in the same land. The owner of the lower mine owes the servitude of support

¹ See *Mitchell v. Rome*, 49 Ga. 19; *Gillmore v. Driscoll*, 122 Mass. 199; *Napier v. Balwinkle*, 5 Rich. (So. Car.) 311; *Tunstall v. Christian*, 80 Va. 1, overruling *Stevenson v. Wallace*, 27 Grat. 77.

to the upper. They have no application, however, when the same person is the owner of both estates.

The owner of minerals is not liable for damages to the surface done by his tenant, unless the mining has been superintended by the owner, and the manner of working was the cause of the injury.

The mine owner may, in the ordinary course of operating his mine, destroy springs upon the surface, and the surface owner may not recover damages therefor. But if the destruction of a spring was caused, not by the ordinary working of the mine, but by the sinking of the surface, by reason of the mine owner's failure to support the same, he is liable for the injury.

The damages for which the surface owner may recover are for injuries already suffered by reason of the removal of the minerals, and which may result from the removal of supports already taken down, but not for injuries which are likely to result from the future removal of supports.

By statute in some states the owner of the surface may compel the owner or lessee of minerals beneath it, to give security for probable damage by mining.¹

Illinois. *Wilms v. Jess*, 94, 464 (1880). Where the surface belongs to one and the minerals to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state.

The lessee of the sole and exclusive right of digging for coal in certain land, and of taking it out and working it, with the right of way and surface of so much as is necessary for economical use of the same, it being agreed that he shall mine the coal in a workmanlike manner, "no pillars to be withdrawn within six hundred feet of the shaft." owes surface support to the grantee of the surface. The compliance with the agreement as to withdrawal of pillars does not relieve him of that obligation.

The duty of surface support only extends to the soil, not to buildings upon it. But the mere presence of buildings does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the buildings. *Prima facie* the act of removing all the coal is the cause of the subsidence.

Penn v. Taylor, 24 Ap. 292 (1887). In an action for damages to the surface by removing support thereto, it is error to charge the

¹ Colorado, M. A. S. 3139, 3159; Dakota, Comp. L. 1887, ch. 19, art. 1, sec. 26; North Dakota, Rev. Codes 1895, sec. 1436; Wyoming, Laws 1888, ch. 40, sec. 6.
2007; Idaho, Act March 5, 1895, sec. 10.

jury: "If it appears from the evidence that the plaintiff, since the injury complained of, has rented his land and house for as much as he rented them before, considering the general decrease in rents, and that the plaintiff has been offered as much, and can or could sell for as much as he paid for it, since the supposed injuries occurred, then the plaintiff has not sustained any substantial damages."

Indiana. *Yandes v. Wright*, 66, 319 (1879). The grantee of all the minerals, except clay and stone, in certain land, who in his operations excavates immediately below a mine which has been opened by the grantee of the right to mine clay in the same land, owes support to the latter, and is liable for injuries to the upper mine caused by his failure to leave sufficient supports to the bottom of it.

Iowa. *Livingston v. Moingona Coal Co.*, 49, 369 (1878). The party owning, under a reservation in a deed, the coal underlying land belonging to another, and having the right to remove the same, is held to the exercise of ordinary care in removing the coal; and if such care requires that pillars or ribs of coal be left in order to protect the property of the surface owners, their removal constitutes negligence entitling the surface owner to damages for the loss caused thereby. Damages were recovered in this case for injuries to a house caused by the breaking up of the surface.

Mickle v. Douglas, 75, 78 (1888). Defendants, owners of land, leased to plaintiff on royalty the right to mine all the coal for fifteen years, unless it was sooner mined out. A railroad had been constructed and operated over the land, and at its suit the plaintiff was enjoined from mining under its right of way, whereupon the plaintiff brought this action for damages sustained by reason of this injunction. He could not recover. "The right to mine is regarded as the servient estate, and can be enjoyed to such extent as will not cause injury to the dominant estate or surface. It is therefore incumbent on the owner of the mining right to leave coal sufficient, or otherwise to support the surface." The lease must be construed to contain an implied covenant that sufficient support must be left so as not to materially injure the surface or dominant estate, unless there is something in the lease depriving the dominant owner of the right.

Michigan. *Erickson v. Mich. Land & Iron Co.*, 50, 604 (1883). A mere reservation of minerals, or such a reservation with the right of mining, must always respect surface rights of support, and will not, standing alone, permit the surface to be destroyed without some additional statutory or contract authority, which will be construed carefully to prevent the destruction of surface rights.

New York. *Marvin v. Brewster Iron M. Co.*, 55, 538 (1874), 56, 671 (1874). All that can be claimed by the surface owner under the right of surface support is that no physical injury be wrought to the surface in its natural state, or as contemplated at the time of the grant. The mine owner is not bound to support buildings subsequently erected. He may dig so that such buildings may fall, he may blast so that they may crack, shake, and crumble, if the surface in its natural state be not injured, though it may be shaken. The exercise of these rights cannot be complained of because they create a nuisance to the owner of the surface. Where there is an express grant

of a right to do all things necessary to attain an end, and a nuisance to the grantor results as a necessary incident, there can be no claim for private damages therefor. Consequently the mine owner cannot be restrained from blasting in the night time as is usual in mines, because it disturbs the sleep and thus affects the health of the surface owner and his family or diminishes the value of his estate.

Burgner v. Humphrey, 41, 340 (1884). When the owner of Ohio. the fee grants the minerals, reserving the surface to himself, the grantee will be entitled to only so much of the minerals as he can get without injury to the surface, unless the contract in plain and explicit language imports the grantor's intention to part with the right of support. This intention is not shown by a grant of all minerals, with the right to mine and remove all minerals; nor by the fact that the instrument was a lease by which the amount of rent was determined by the amount taken out. Nor is it to be inferred from a provision that no mining operations shall extend to or be so near the dwelling house or barn as to injure said buildings. Evidence of a custom to the contrary is not admissible.

The provision against mining near to the dwelling house and barn exempted the coal thereunder from mining operations; and the grantor was entitled to compensation for the mining of such coal. In such compensation he was not limited to the price fixed by the contract for other coal mined on the premises, but might show its amount and value otherwise. With this compensation, indemnification for damages to the buildings is not to be confounded.

Offerman v. Starr, 2, 394 (1845). The owner of a Pennsylvania. mine is not liable for damages to a house on the surface caused by the working of the mine by his tenant. It seems that this rule applies whether the tenant is a lessee or a licensee. A reservation in the lease of a right to visit the mine and examine the manner in which the business is carried on, and to resume possession on failure of the tenant to render accounts or pay rent, does not render the owner liable for injury to property on the surface caused by his tenant's manner of working the mine.

Little Schuylkill N. R. & C. Co. v. Tamaqua, 1 Walk. 468 (1860). Where a landlord superintends the mining of coal by a tenant, he is liable for repairs to a highway rendered necessary by a cave-in caused by the mining. "A part of the road was destroyed by the caving in of the ground, caused by the improper working of a coal vein of the defendant below, by their lessee of the coal right; and the question is whether the landlord or the tenant is liable for the repairs. Undoubtedly, the rule is that the tenant alone is liable; for usually he alone can be chargeable with the misfeasance that causes it. But in this case it is perfectly clear that all the mining, especially with relation to the pillars to support the surface, was planned and directed by the agents of the defendant below, — the landlord, — and therefore the general rule just stated does not apply to this case. Under such circumstances the landlord is clearly liable. It was entirely unnecessary for the court to say that the landlord was liable whether he gave the directions or not; for the fact that they were given is very clear on the evidence, and therefore we are not asked to affirm so broad a principle."

Jones v. Wagner, 66, 429 (1870). The owner of a mineral estate, if the law be not controlled by the conveyance, owes a servitude to the superincumbent estate of sufficient support. A failure to leave such support is negligence. This right of support extends to reasonable buildings. This rule of law may not be controlled by usage, unless it be so ancient and uniform as to amount to a custom.

Lawrence's Ap., 78, 365 (1875). See this case on page 190, *ante*.

Coleman v. Chadwick, 80, 81 (1875). Where the owner of land grants the minerals, reserving the surface to himself, the grantee is only entitled to so much of the minerals as he can get out without injury to the superincumbent soil. The plea of a custom to the contrary cannot be entertained.

The grantor may, by his grant, part with his right of surface support. This is not done by provision for "all the privileges necessary for the convenient working, mining, and transportation of said coal and deposition of excavated matter, and also all rights and privileges incident or usually appurtenant to the working and using of coal mines." The owner of the surface cannot recover for the loss of springs occasioned by the ordinary operation of mining by the owner of the substrata.

Trout v. McDonald, 83, 144 (1876). If the destruction of a spring is a necessary incident of mining under a lease, it is *damnum absque injuria*.

Mine Hill & S. H. R. R. Co. v. Lippincott, 86, 468 (1878). See this case on page 190, *ante*.

Brown v. Torrence, 88, 186 (1878). Where the owner of coal mines the same without leaving sufficient ribs or pillars to support the surface or setting up sufficient artificial supports, so that the surface falls in, he is liable to the surface owner for such damage as he sustains, not only in injury to the land actually fallen in or cracked, but in the effect thereof on the whole of his land.

Nelson v. Hoch, 14 Phila. 655 (1879), *C. P. Schuylkill Co.* The owner of land leased all the workable coal in a vein lying thereunder, "to mine thoroughly, economically, and in a safe, skilful and workmanlike manner, all of the veins above and below water level, preserving due regard for drainage, proper and sufficient gangways, breasts, supports, ways and ventilation, and other means whatsoever for the secure and productive mining of said veins." Subsequently the surface was laid out in lots and sold, and buildings (a village) erected thereon. The lessees owed surface support to the grantees of the surface, and might not remove all the coal. An injunction against the further removal of coal beneath the lots was granted upon a bill showing that there had been already a subsidence of the surface by reason of the lessees' operations, and alleging that further mining would jeopardize the lives of the inmates of the buildings and do great and irreparable injury to the property; and this injunction the court refused to dissolve.

Scranton v. Phillips, 94, 15 (1880). Where one grants the surface of land and reserves the mines beneath, the implied right of support to the surface which passes with the grant may, by apt words of conveyance, be excepted; and where such exception has been made, the

grantor, or those who claim through him, may mine all the coal, even though by such mining the surface should fall in. The owner of a tract of land conveyed it, "excepting and always reserving all the coal beneath the surface of and belonging to said premises, with the exclusive right to the said Joseph Fellows, his representatives and assigns, to remove the same by any subterranean process incident to the business of mining, and also to pass through the said premises by any subterranean passage to mine and to remove the coal from any adjacent lands, without the right, however, to enter upon the surface of said premises for any purpose whatever; . . . and with full and unconditional release and discharge forever on the part of the said party of the second part, her heirs and assigns, to the party of the first part, his heirs and assigns, from any liability for any injury that may result to the surface of the said premises from the mining and removal of the said coal; and with a quitclaim on the part of the party of the second part to the party of the first part, his heirs and assigns, of all right, title, and interest in and to said coal, and the privileges of mining and removing the same as aforesaid." *Held*, that the owner of the minerals did not owe surface support to the surface owner.

A lessee of the minerals, under a lease that provides that he shall not be responsible for the falling in of the mines or the surface, and that he shall leave such supports as shall be deemed by those having experience in mining to be sufficient to prevent the surface falling in, has the same immunity from liability therefor as his lessor.

Carlin v. Chappel, 101, 348 (1882). A surface owner is entitled to actual support for his land at the hands of the owner of mines beneath it. Where the owner of land conveyed it in fee simple, excepting and reserving all the underlying coal, with the right of mining, excavating, and conveying away the same; and subsequently conveyed to another party the coal and privileges so excepted and reserved: *held*, that the grantor's assigns of the coal were liable for damages occasioned to the owner of the surface by subsidence caused by mining the underlying coal. That the mining was carefully done according to the usual practice of mining was no defence.

Berwind v. Barnes, 13 W. N. C. 541 (1883). The grantee of a right to mine underlying coal is bound to afford sufficient support to the overlying land, and is liable for his failure to do so, even in the absence of actual negligence.

The owner of land conveyed the right of mining all the coal thereunder by a deed containing a stipulation to hold the grantee harmless against all damages that might arise from the giving way of the surface after the removal of the coal underneath; *dubatur*, whether this was anything more than a mere personal covenant of indemnity of the grantor, and whether, therefore, subsequent grantees of the surface would be precluded from bringing suit against the grantees of the coal for a failure to furnish surface support.

The owner of land sold the right to mine all coal thereunder by articles of agreement, which were recorded, the grantees at once taking possession. He then sold the surface land to various grantees, who also at once took possession. Subsequently he conveyed the mining rights to the grantees in the article of agreement, by a deed wherein

was a stipulation to hold them harmless against all damages that might arise from the giving way of the surface land in consequence of the mining operations. The said parties having failed to furnish a sufficient surface support, the grantees of the surface brought an action against them to recover damages. *Held*, that the grantees of the surface were bound, in consequence of the possession of the grantees of the mining rights at the time of the conveyance to them, to take notice only of the provisions of the articles of agreement as to such mining rights then on record, and that they were not bound by the stipulation in the subsequent deed to the purchasers of the mining rights as to surface support, which stipulation was not in the original articles of agreement, and of which they had no notice. Therefore, they were entitled to recover.

Lourey v. Hay, 2 Walker, 239 (1885). The owner of a mineral estate, unless relieved by the terms of the conveyance, owes a servitude of sufficient support to the superincumbent estate. A reservation of "all the coal, iron ores, fire clay and all other minerals and substances, both liquid and solid, under the surface of said land, except limestone." does not give such relief. The effect of the deed is not changed by parol evidence that at the time of the purchase the grantor told the grantee that the mining of the coal would let the surface down several feet.

Gumbert v. Kilgore, 6 Cent. Rep. 406 (1886). Where all the coal under the surface of certain land has been granted to one person, and the surface subsequently to another, the latter has a right to actual support for his soil, and the former has a right to take out his coal in any way he pleases, provided he supports the surface in its ancient condition. His obligation is to support the surface in its natural condition, not to support buildings erected thereon; but if an ordinary house is built upon the land, and injury occurs to it by reason of the mine owner's failure to support the surface in its natural condition, he is liable for damages to the house. The owner of the coal is liable to the surface owner if a spring is ruined through failure to support the surface properly, but not when the injury to the spring is caused by the mining operations when the support of the surface is sufficient.

Heckscher v. Shaefer, 12 Cent. Rep. 444 (1888). Defendant leased to plaintiff, for fifteen years, the exclusive right of mining coal from certain coal beds, with a stipulation that pillars should be left on approaching any boundaries of lessor's land, and that the mines should be worked in a safe, skilful, and workmanlike manner, and so as not to interfere with the rights and privileges of any owner of town lots in W. S. or S. C. Subsequently lessor sold surface lots to various persons, who erected dwelling houses and various improvements thereon. The deeds for these lots released the lessor from liability for damage that might be done by the lessee. He, in taking out coal, caused the surface to subside, and was, upon the suit of lot owners, enjoined from taking out more coal. He was thus prevented from taking out one hundred thousand tons. Defendant then purchased surface lots, and directed plaintiff to take out the coal; but during the continuance of the injunction, for several years, the workings became closed, and he could get out but twelve thousand tons, at

a great expense. Plaintiff offered to prove that the usual method of mining coal under similar conditions, throughout the mining region, justified a subsidence of the surface; and also that defendants, at the time of leasing and prior thereto, had represented that the lease should embody the right to remove all the coal, and subsequently had, by verbal and written instructions, required and directed them to mine in such a way as necessarily to let down the surface. This was inadmissible. If these alterations of the lease were made prior to the sales of the surface, the plaintiff could have set them up as against the lot owners, and it was not defendant's fault that he did not do so. If they were made after these sales, plaintiff was affected with notice of their right of surface support.

Williams v. Hay, 120, 485 (1888). Where one person owns the surface, and another person owns the minerals lying underneath, the mineral estate owes a servitude of sufficient support to the upper or superincumbent estate. This principle has no application where the same person is the owner of both estates, nor does it apply where, by the contract between the parties, they have covenanted for a different rule. Like any other right, the owner of the surface may part with this by his deed or covenant. But it is not to be taken away by mere implication from language which does not necessarily import such a result. Where a reservation of minerals in a deed of land contains the words, "Provided, however, that the said B., his heirs and assigns, in mining and removing the coals, iron ore, and minerals aforesaid, shall do as little damage to the surface as possible," the surface owner is not thereby deprived of his right of surface support. This right is absolute, without regard to whether the mining is done skillfully or negligently.

Bestwick v. Coal Co., 129, 592 (1889). A coal contract, executed by trustees who had the legal ownership of the coal, but not of the surface, granted and conveyed all the coal under a tract of land, the grantees covenanting to mine and remove four thousand tons of coal yearly, or pay for the same as though mined. The contract also granted to the party of the second part the "right of way through, over and under said land, to transport coal from adjacent lands." It was provided, also, that the grantees, etc., should have the right to abandon this contract, and yield up said coal mine and privileges, at any time they should determine in their judgment that said coal was, in quantity, quality or condition, no longer minable with economy and profit. At a certain date the grantees delivered to the grantors a deed of release and surrender of all the coal conveyed, and all the right, title, etc., of the grantees therein, but continued afterwards in the use of the way through the coal conveyed, to coal operated by them on adjacent lands.

Held, the grantees were bound for the payment of the amount of royalty so long as they retained possession and use of the right of way, and the fact that all the coal except the ribs had been removed was no defence. The grantors had the right to have all the coal removed, and the right of the surface owner was not in question.

Penn Gas Coal Co. v. Versailles Fuel Gas Co., 131, 522 (1890). See this case on page 191, *ante*.

McGregor v. Equitable Gas Co., 139, 230 (1891). See this case on page 192, *ante*.

Hill v. Pardee, 143, 98 (1891). The owner of land leased the coal therein to Pardee and others, and subsequently conveyed the same land, reserving the coal and covenanting that the earth should not be broken or displaced, and to make good any damage which might be done to the land or buildings erected thereon by the exercise of the reserved mining privileges. The title of the grantee having become vested in plaintiff, he brought trespass for damages to the surface, joining the owner and lessee of the coal as defendants. *Held*, that the lessee alone was liable for the tort, and the owner was improperly joined. Had the action been in contract on the above covenant, it would have been improper to join the lessee.

McGowan v. Bailey, 146, 572 (1892). The surface owner may recover for damages to the surface already suffered by removing minerals and damages likely to result from the removal of supports already taken down, but not for damages likely to result from future removal of supports.

Davis v. Jefferson Gas Co., 147, 130 (1892). See this case on page 192, *ante*.

Kistler v. Thompson, 158, 139 (1893). Where, by reason of the failure of the owner of the coal to maintain sufficient supports, the surface subsides and cracks, and a spring of water is thereby diverted, the owner of the coal is liable for the resulting damage.

An owner of coal, who has leased the same, but reserved in the lease the right to indicate the amount of coal to be taken out and the amount of support to be left, which right he has exercised, is liable to the surface owner for injury resulting from failure to support the surface.

Pringle v. Vesta Coal Co., 172, 438 (1896). "Where there has been a separation of the coal from the surface, the owner of the latter, in the absence of agreement to the contrary, has an absolute right to have his surface supported precisely as it was in its natural state. If the owner of the coal undertakes to mine and remove it, — as he has an undoubted right to do, — and damage results to the surface, either (a) from negligence in conducting his mining operations, or (b) from failure to properly and sufficiently support the surface, or (c) from both these causes combined, the surface owner is entitled to recover compensation for such injury as he may show he has sustained.

"In stating his claim, plaintiff substantially avers that the injuries of which he complains were the result of two causes, negligent mining, and defendant's failure to provide proper surface support. It was competent for him to prove on the trial that said injuries resulted from both of these causes combined, or from either of them separately."

Robertson v. Youghioghny R. C. Co., 172, 566 (1896). Where the mineral estate is severed from the surface by a conveyance, the lower estate passes to the grantee subject to the servitude imposed on it by nature for the support of the surface. The owner of the mine must leave enough of the mineral in place to answer the purposes of

support for the surface, unless the owner of the surface has released his right to support. Such release must be by express words in, or by necessary implication from, the grant. The rule is not qualified by the principle of *Penna. Coal Co. v. Sanderson*, 113 Pa. 126.

In an action to recover damages for injury to the surface by mining beneath it, evidence that the mining was not negligently done, or that it was conducted according to approved methods, is irrelevant.

II. LATERAL SUPPORT.

To such mining operations as are carried on by the excavation of pits, the general principles of the law of lateral support are, as a rule, applicable. The owner of land has an absolute proprietary right to have his land supported in its natural condition by the adjoining land. If the adjoining owner deprives the land of this support, he is liable in damages; and in cases where he threatens to take away the support, to the serious and irreparable injury of the land, he will be enjoined. This right does not extend to buildings, unless the right to their support has been acquired by grant, express or implied. Nor can an adjoining mine owner claim the right where he himself has by his operations diminished the power of self support of his own land. The principles of lateral support do not apply to cases between the owner of land and the owner of the right to mine, or of minerals reserved out of the land. They are not contiguous owners, and the reservation of the minerals is inconsistent with the right of supporting the land laterally. Nor have these principles any application to such mining claims as are necessarily worked by the hydraulic process, where the very purpose of the location is to tear down and wash away the land.

The right of lateral support is preserved by statute in Nevada.¹

A mine owner or operator is, of course, liable for any damage which is done to the adjoining land by reason of negligent or careless mining. This is without reference to any obligation of lateral support, which is a right of property in no way depending upon negligence.

California. Hendricks v. Spring Valley M. & I. Co., 58, 190 (1881).

Plaintiff and defendant being owners of adjoining mining claims of the kind known as "deep diggings," which were worked by the hydraulic process, the latter in mining his ground washed away the gravel so that the bank fell, and a portion of the surface of the plaintiff's claim fell upon the ground of the defendant, and gold was extracted from it by defendant. The defendant's work was not con-

¹ Gen. Stats. 1885, secs. 244-6; Act March 13, 1891, p. 37.

ducted in a careless or improper manner. *Held*, the doctrine of lateral support has no application in such a case, where the very purpose of locating is to tear down and wash away the ground. The defendant would be liable for the amount of gold taken from the gravel that fell from plaintiff's claim, but for the fact that in this case its value was less than the necessary cost of extraction.

Minnesota. *Schultz v. Bower*, 57, 493 (1894). "The right of lateral support from the adjacent soil is an absolute right of property; and, as a consequence of this principle, it follows that for any injury to his soil, resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy against the party by whom the mischief has been done. This remedy does not depend upon negligence, but upon the violation of the right of property. This unqualified or absolute right of lateral support applies only to the land itself, and not to the buildings or other artificial structures. Where one, by digging in his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other's land to fall."

Missouri. *Victor M. Co. v. Morning Star M. Co.*, 50 Ap. 525 (1892). The right to lateral support applies only to the land in its natural state, and not to the weight increased by artificial structures, nor when the self-supporting power of the land has been diminished. Where the plaintiff, in conducting his operations, has not left the pillars and other supports necessary to insure the safety of the superincumbent earth, on which he has heavy structures and operates machinery, he is not entitled to lateral support from his neighbor, and cannot enjoin him from mining with ordinary care up to the line when the earth is such that a perpendicular wall would sustain its own weight and the natural pressure thereon by the power of its own coherence.

If defendant should mine carelessly, so as to cause the caving or subsidence of plaintiff's land, he would be liable in damages.

New York. *Gourdier v. Cormack*, 2 Smith, 200 (1853). Where, in blasting rocks on his own land, an owner threw stones upon an adjoining lot, and so extended his blast as to forcibly split out the rock on the adjoining lot, undermining the foundation of the house thereon and rendering it insecure, he was liable in damages to the tenant of the adjoining lot.

Furrand v. Marshall, 21 Barb. 409 (1855). The right of lateral support is an incident to the land, a right of property naturally and necessarily attached to the soil. A proprietor has the entire dominion of his own, and he may use his land as he pleases, so long as he does not disturb the dominion or rights of others to the beneficial use of their land. An owner of land has the right to the support of his land in its natural condition by his neighbor's land. The latter may excavate his soil to any depth he pleases, but he may not deprive the former of this support. Hence where plaintiff's land was in its natural condition, and the adjoining owner had excavated his land, for the purpose of making bricks, to a depth of fifty feet, whereby plaintiff's land was beginning to sink and crack, and defendant had given notice that he would continue his excavations up to the dividing line

and to an indefinite depth, he will be enjoined from digging so near the line as to do any injury to plaintiff's land.

Ryckman v. Gillis, 57, 68 (1874). Defendant sold and conveyed by warranty deed to plaintiff's grantee a piece of land, reserving the right to enter upon a portion thereof, particularly described, "at all times thereafter, so long as the clay and sand may last or be used for brick-making purposes," and to dig and take therefrom the clay and sand that may be found thereon fit for brick making. In digging and removing the clay and sand, some of the adjoining land fell into the excavations. *Held*, an action to restrain defendant from removing so much of the soil as was necessary to furnish lateral support to the adjoining land could not be maintained. "The plaintiff and defendant were not contiguous owners of different pieces of land; the former owned the fee, the latter had only an incorporeal right to excavate the reserved clay and sand upon a specifically described part of the land. The doctrine of lateral support and other rights incident to and affecting lands adjacent to each other, owned by different proprietors, has no application to such a case."

The right of support might have been expressly secured to the owner in fee of the land by the deed, but here "the intention of the parties is carried out by a reservation of the right; and that form of securing it was, I think, adopted with the intent of relieving the land designated for its exercise from the burden of supporting that adjacent thereto, to which an exception of the land itself from the grant would have subjected it."

Pennsylvania. *Wier's Ap.*, 81½, 203 (1874). The defendant's land was on a steep slope of a hill, and was used for quarrying stone; the plaintiff, who adjoined, had made a roadway, by embanking and supporting it by a wall.

Defendant, by stripping his land and quarrying, brought down the plaintiff's land; but this was found to be by removing its natural support, and not by reason of the weight of the wall and embankment. The defendant was enjoined from quarrying, excavating, or stripping his land so near the plaintiff's as to take away the natural lateral support, which was found by the master to be forty feet, with privilege to defendant to make a nearer approach upon making a substantial support to plaintiff's land.

CHAPTER XXII.

MINING ON THE LAND OF OTHERS. — TRESPASS.

To excavate and take minerals from the land of another without his consent is a trespass, whether this be done by going upon the land and taking out minerals, by mining over the boundaries thereof on the surface or subterraneously, or by working into the dip of a vein which is within the operation of the apex rule and belongs to another. It is likewise a trespass to enter upon premises in the actual possession¹ of another for the purpose of performing the acts necessary to constitute a location; such an entry cannot be the basis of acquiring title. One who enters the side lines of the lode location of another is *prima facie* a trespasser, but he may rebut the presumption by showing that he is following the dip of his own vein.

The injured party may have his remedy in an action of trespass against the wrongdoer, or he may bring trover for the minerals taken against whosoever he finds in possession thereof, or he may waive the tort and bring an action of assumpsit for their value. He may also reclaim the minerals as his property, if he can identify them, in whosoever hands he finds them (provided they have not become attached to real estate), and for this purpose may maintain an action of replevin. Where, however, the minerals are taken by one in adverse possession, in the exercise of a colorable title, without force or fraud, trespass or trover will not lie.

In addition to these legal remedies, the owner of land or minerals may have an injunction against one who wrongfully takes minerals from his mines. This equitable remedy is the subject of another chapter.²

It is the duty of a mine owner, as of any one else, not to encroach upon his neighbor's land. He is obliged to know the boundaries, and to keep upon his own side of them.³ When he

¹ Actual possession is rendered unnecessary in Colorado by Laws 1893, p. 349, M. A. S. Supp. 3164 a.

² Chap. XXIII., Div. III., "Injunction."

³ For statutes requiring the leaving of walls and pillars, see *ante*, p. 632.

mines near to the boundary, if it is indistinct or indefinite, it is his duty to ascertain it by survey. The rule that the owner or lessee of a mine must ascertain its boundaries at his peril has, however, no application between lessor and lessee, where adjoining mines belong to the same person and are leased by them to different lessees. The lessor in such a case had the power to protect himself by covenant, and neglecting to do so, he cannot take advantage of a rule existing *ex necessitate rei*. Even if by the terms of the lease it became the lessee's duty to mark a theoretical division line, an encroachment beyond it, in an honest attempt to ascertain it, would not constitute a trespass. The lessee would only be liable for negligence or improper mining. Where one adjoining owner points out an incorrect division line to his neighbor, he will be estopped from denying it to be the true line, if at the time he knew it was not such, and his neighbor was ignorant thereof. But if he in good faith pointed out an incorrect line, he is not estopped, but may subsequently, upon the ascertainment of the correct line, treat his neighbor as a trespasser if the latter persist in disregarding the true boundary.

As it is the duty of him who takes minerals to know whence he takes them, it is likewise his duty to know when he has taken them. And if he sets up as a defence to an action that a part were taken before the plaintiff acquired title, he must show what part. Where one is mining near the boundary of his land, he should keep an accurate account of what he takes out. If he fails to do so, evidence as to its value will be most strongly construed against him. If he refuses to allow an inspection by the adjoining owner, who suspects that he is mining over the boundary, equity will order an inspection, and will likewise decree an account pending a dispute as to the exact situation of the boundary.¹

Subterranean trespasses are peculiarly susceptible of concealment from the injured owner, and it is generally within the power of the trespasser, by failing to disclose the trespass, to pre-

¹ See Chap. XXIII., Div. V., "Inspection." In some States this right of survey and examination has been secured and defined by statute. Colorado, M. A. S. 3164; Dakota, Comp. L. 1887, ch. 19, art. 1, sec. 2014; Idaho, Rev. Stats. 1887, sec. 4542; Illinois, Hurd's Rev. Stats. 1895, ch. 94, secs. 2-5, p. 1052; 2 Starr & Curtis, Ann. Stats. 2739; Michigan, How. Ann. Stat. 4122-6; Missouri, Gen. Stats. 1889, secs. 7040-2; New Mexico, Act Feb. 11, 1887, p. 206; North Dakota, Rev. Codes 1895, sec. 1442; Ohio, Rev. Stats. 1890, secs. 4374-9; Virginia, Code 1887, secs. 2571-2.

vent the other party from asserting his right to redress within the statutory period. Such action on the part of the trespasser is fraudulent, and suspends the running of the statute until such time as the injured party discovers, or reasonably could have discovered, the trespass. Until that time it was not practicable for him to assert his right, and he is not within the mischief which the statute is intended to remedy. A different view was held in Ohio, but the legislature has brought the law of that State into conformity with the view above expressed.¹

Where minerals have been mined and removed unintentionally or by mistake from the land or mine of another, the measure of damages in trover is the value of the minerals taken; and in trespass, this value, increased by the injury done to the land by their removal. There are two views as to what is the value of the minerals which is to be used as a measure of damages. The better view is that it is the value *in situ*; that is, the value at the pit's mouth, less the expense of mining and of carrying it to that place. This view is held in Massachusetts, Missouri, Nevada, Pennsylvania, South Carolina, and Tennessee, and the United States courts of the Eighth Circuit. This valuation may also be expressed as the usual royalty paid for the right of mining.

The other view is, that the value of the minerals to be used in estimating damages is their value when they first became chattels; that is, immediately on severance from the land, without deduction for the cost of severance. It is the value at the pit's mouth, less only the expense of conveying it to that place and of preparing it for market after the first act of severance. This rule prevails, in the case of innocent trespasses, in California, Illinois (where no allowance is made for separating the mineral from the earth and refuse after it is severed from the land, or for breaking up the large masses), and Maryland. This same rule is laid down in Colorado, Nevada, and the United States Supreme Court as applicable to intentional trespassers. And the New York courts seem to adopt it as a general rule applicable whether the trespass is intentional or not. In Maryland, if the trespass be intentional, wilful, or the result of wilful negligence, the plaintiff is entitled to recover punitive damages in addition, — damages compensatory for the wanton wrong.

That the cost of extraction was more than the value of the

¹ Rev. Stats. 1890, sec. 4982.

mineral is no ground for a nonsuit, as, the trespass being proved, the law will presume nominal damages. A contrary view seems to have been taken in a California case.

In an action of trespass, to the value of the minerals is to be added the injury done to the land itself by the taking or the mode of taking. If by reason of the trespass it has been rendered impossible or more difficult to take out the minerals that are left, the plaintiff is entitled to the value *in situ* of the minerals which he cannot take out, and to the decrease in value of those that have been rendered more difficult of access, and the depreciation in the value of the land. It is of no consequence that the injury did not occur until some time after the act done, if that act was the efficient cause thereof.¹ The defendant is then not entitled to deduction for working expenses. In addition to this, if one takes minerals from the land of another *animo furandi*, he is guilty of larceny, and in many states wilful trespass without such intent is made a misdemeanor.²

It is no defence to an action for mining and carrying away coal from plaintiff's land, that, owing to the small size of plaintiff's tract, the cost of mining to him would have been greater than the value of the coal. If the defendant took the coal, such an inquiry is irrelevant.

An injury analogous to that of mining on the ground of another, is that of boring for oil on the "protection" of an oil lease. The lessee in such case has, besides his remedy by injunction, an action on the case for the tort, in which the measure of damages is the decrease in the value of the leasehold by reason of the defendant's wrongful act.

Flagstaff M. Co. v. Tarbet, 98, 463 (1878). A United States. locator working subterraneously into the dip of a vein belonging to another who is in possession of his location is a trespasser, and liable to an action for taking ore therefrom.

¹ Damages for wilful trespass are fixed by statute in Illinois, Rev. Stats. 1895, ch. 94, secs. 2-5, p. 1052; 2 Starr & Curtis, Ann. Stats. 2739; Missouri, Act March 30, 1893, p. 264; Nevada, Act March 13, 1891, p. 37; Pennsylvania, Act of May 8, 1876, P. L. 142; Utah, 2 Comp. L. 1888, sec. 2792, p. 139.

² See *ante*, pp. 5-7; Georgia, Code 1882, secs. 4433-4; Illinois, Rev. Stats. 1895, chap. 94, secs. 2-5, p. 1052; Michigan,

2 How. Ann. Stats. 9173; New Mexico, Act Feb. 28, 1889, sec. 8, p. 247; Act Feb. 26, 1891, p. 133; Ohio, Rev. Stats. 1890, sec. 6881; Oregon, Hill's Ann. Laws 1892, secs. 1793, 1805; Pennsylvania, Act May 8, 1876, P. L. 142; Utah, 2 Comp. L. 1888, sec. 2792, p. 139; Virginia, Code 1887, secs. 2570, 3710; Act March 8, 1894, p. 949; Wisconsin, Ann. Stats. 1889, secs. 4441-2, p. 2245.

Tabor v. Big Pittsburg Con. S. M. Co., 4 McCrary, 299 (1883), C. C. D. Colo. Taking ore from a mine without the consent of the owner is a trespass, and none of the elements of a contract can be found in it, though the mine owner may waive the tort and sue for money had and received. This is not an action on a contract within the meaning of an act giving a writ of attachment in such an action.

Cheesman v. Shreve, 37 Fed. 36 (1888), C. C. D. Colo. Parties who attempt to enter beneath the surface within the side lines of the patented land of another, and to mine and take ore therefrom, are *prima facie* trespassers. Where such entry is justified under Rev. Stats. 2322, the case is within the jurisdiction of the federal courts.

Cheaney v. Nebraska & C. Stone Co., 41 Fed. 740, C. C. D. Colo. (1890). A land owner who in good faith points out to the owner of adjoining land an incorrect division line, is not estopped from denying that such line is the true boundary; in order to estop him, he must have knowledge and the other must be ignorant of the true boundary. If, after the true boundary has been ascertained, the latter continues to work a quarry upon the land of the former which was opened upon the faith of the incorrect boundary, he is a wilful trespasser, from whom the former may recover damages. The measure of these is the value of the stone taken after it was detached from the land and had become personalty.

Benson M. Co. v. Alta M. Co., 145, 428 (1892). In trespass for removing ore from plaintiff's mine, defendant is not entitled to be credited with the cost of mining, where he knew that it belonged to plaintiff. The measure of damages was the value of the ore, less the cost of removing it from the mine and of separating it from the worthless rock.

Montana Co. v. Clark, 42 Fed. 626 (1890), C. C. D. Mont. Defendant, whose claim was in shape a triangle and consequently had no end lines, followed the vein having its apex therein beneath the surface of plaintiff's claim. The vein not having its apex within the latter's claim, he could have no title to it, and could not enjoin defendant from following it.

"The presumption may be that he who enters within the lines of another's mining claim on the surface, or beneath the same, is a trespasser; but where, as in this case, the fact is alleged that the defendants entered upon the Marble Heart claim by following down on its dip, a vein or lode whose top or apex was without the limits of plaintiff's premises, a case is stated that shows that defendants were not trespassers upon plaintiff's premises, that they were following premises that did not belong to plaintiff."

Doe v. Waterloo M. Co., 54 Fed. 935 (1893), C. C. D. Cal. One who mines within the surface boundaries of another's claim is *prima facie* a trespasser, and upon him lies the burden of proving his right to do so. This he may do by showing two things: first, such a location as entitles him to follow on its dip, a vein having its apex within his surface lines; second, that the acts complained of were done on such a vein. It is not sufficient to prove that the apex of the vein upon which he is working is outside of plaintiff's lines. He must show ownership as well.

Colorado Cent. Consol. M. Co. v. Turck, 70 Fed. 294 (1895), C. C. Ap., 8th Circ. In trespass for unlawfully taking ore from plaintiffs' vein, the measure of damages, when the defendant is not a wilful trespasser, is the value of the ore less the cost and expense of breaking it and bringing it to the mouth of the mine; and where the ore has been taken by the lessee of the defendant, who received a royalty thereon, such royalty may be taken as his net profit.

Maye v. Yappen, 23, 306 (1863). When two mining claims adjoined each other, and the owners of one claim worked across the dividing line and took away gold-bearing earth from the other claim, the fact that they did so in ignorance of the location of the line is immaterial; and evidence of this fact is inadmissible in mitigation of damages or as a defence. The measure of damages is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. In estimating the damages, the expense of extracting the gold and separating it from the earth, after it is first moved from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiff. The fact that plaintiff told defendant that he did not know where the line ran, but that defendant need not be uneasy, for he was not near the line, and had fifty feet still to run before he could reach it, does not amount to a license or permission to work on plaintiff's ground, nor does it estop plaintiff from recovering the damage he has actually sustained.

Hendricks v. Spring Valley M. & I. Co., 58, 190 (1881). Plaintiff and defendant being owners of adjoining mining claims of the kind known as "deep diggings," which were worked by the hydraulic process, the latter in mining his ground washed away the gravel so that the bank fell, and a portion of the surface of the plaintiff's claim fell upon the ground of the defendant, and the gold was extracted from it by the defendant. The defendant's work was not conducted in a careless or improper manner. He would be liable for the amount of gold taken from the gravel that fell from plaintiff's claim, but for the fact that in this case its value was less than the necessary cost of extraction.

Empire G. M. Co. v. Bonanza G. M. Co., 67, 406 (1885). Where one of two adjoining owners of mining claims drifts upon and mines from the ground of the other, the measure of damages for the trespass is the amount that will fully compensate the plaintiff for all detriment proximately caused by the trespass. The trespass being proved, the law presumes nominal damages, and the defendant cannot justify his act and obtain a verdict by proof that the cost of extracting the ore was greater than the value of the ore.

Huginin v. McCuniff, 2, 367 (1874). Defendants conveyed a mine to C., and delivered a shaft and level in the mine to plaintiffs as agents of C., retaining a certain other shaft and level in the same lode not connected with the first, apparently claiming that part as upon another lode. C. contracted to sell to plaintiffs the same mine, and gave them a bond for a deed. Afterward, by sinking a shaft and stoping, defendants took ore from the level and shaft retained by them, but the opening was not extended longitudinally. In trespass for the value of ore so taken: *held*, plaintiffs had not actual

or constructive possession of the *locus in quo*, because, first, throughout the length of the level retained by them, defendants had actual possession of the vein from the surface to the centre of the earth; secondly, plaintiffs' possession, whether referred to the bond, or as vendees or licensees of C., could not be extended to the part actually occupied by defendant; and, thirdly, in a court of law plaintiffs had no title.

Lebanon M. Co. of N. Y. v. Consolidated Republican Mining Co., 6, 371 (1882). Entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession amount only to a trespass, and cannot form the basis for acquiring title.

To the same effect is *Weese v. Barker*, 7, 178 (1883).

Little Pittsburg Con. M. Co. v. Little Chief Con. M. Co., 11, 223 (1888). In an action to recover the value of ore which defendant had wrongfully taken from plaintiff's ground, the defence was set up that a part of the ore was the property of plaintiff's grantor. The burden of proving the amount thereof was upon the defendant. On a question of liability with respect to working minerals underground, which cannot be perceived in the same way as operations upon the surface, the burden of proving whether the mineral was taken before or after plaintiff's title accrued, or how much before and how much after, lies upon the defendant, within whose knowledge and that of his workmen it is solely. This case is analogous to a case where the Statute of Limitations was pleaded as to part, and the burden of proving that part was put upon the defendant. *Dean v. Thwaite*, 21 Beav. 621.

Omaha & Grant S. & R. Co. v. Tabor; 13, 41 (1889). In an action against persons who bought ore from others who had tortiously taken it from plaintiff's mine, the measure of damages is the value of the ore sold, less the reasonable and proper cost of raising it from the mine after it was broken and hauling it to defendant's place of business. In such a case in Colorado interest is recoverable under statute.

McFeters v. Pierson, 15, 201 (1890). A person having possessory title may maintain an ordinary civil action against a trespasser; and such action lies for injury to (as by cutting and carrying off) timber as well as to the minerals themselves. To maintain such an action it is not necessary that the owner of the claim should have had an actual *pedis possessio* thereof. In such an action it is not necessary for plaintiff to allege and prove in the first instance citizenship and compliance with the requirements of location under the act of Congress.

Robertson v. Jones, 71, 405 (1874). In trespass for taking Illinois. coal from plaintiff's land, he can recover the value of the coal after it is dug in the bank, or its value at the mouth of the pit, less the cost of conveying it, after it is dug, to the mouth of the pit. He is not limited to the value of the coal in the ground. If he makes demand for the coal while it is in the possession of the one who took it from his land, he may in trover recover the value of the coal in the condition it was when he made the demand.

McLean County Coal Co. v. Long, 81, 359 (1876). In trover for coal taken from plaintiff's mine and converted to the use of defendant, the measure of damages is the value of the coal at the mouth of the pit, less the cost of conveying it from the place where it was dug to the pit's mouth. The measure of damages in trespass is the same.

Illinois Coal Co. v. Ogle, 82, 627 (1876). In trespass for taking coal from plaintiff's land, the defendant being ignorant that he was mining upon the land of the plaintiff, the measure of damages is the value of the coal at the mouth of the pit, less the cost of carrying it there from the place where it was dug, without any allowance for digging.

Illinois Coal Co. v. Ogle, 92, 353 (1879). Rule stated in the last case adhered to. Where the trespass was knowingly and wilfully committed, punitive damages may be recovered. In trover for coal wrongfully taken from plaintiff's mines, the measure of damages is the value of the coal in its state or condition as a chattel, without deducting anything for mining; and if the trespasser has sold it, the plaintiff may waive the tort and recover in assumpsit the full amount received therefor.

McLean County Coal Co. v. Lennon, 91, 561 (1879). In trover for coal taken from plaintiff's land, the measure of damages is the value of the coal at the mouth of the pit, less the cost of conveying it there from the place where dug or mined, allowing nothing for digging, or the labor of separating the stone, sulphur, slate, and earth from it, or breaking up the large masses, and brushing the road. The tortfeasor is allowed nothing for the mining or any other act necessary to the production of the coal as an article of commerce.

Thomas Pressed Brick Co. v. Herter, 60 Ap. 58 (1895). Rule as laid down in last case applied in trespass for mining upon the land of an adjoining owner.

Oskaloosa College v. Western Union Fuel Co., 90, 380 (1894).

Iowa. A tenant is liable as a wilful trespasser if he mines on the land of the lessor, which is reserved from the lease. He is not excused by the fact that he has wrongfully construed the lease.

Hawesville v. Hawes's Heirs, 6 Bush, 232 (1869).
Kentucky. Where the absolute title to the streets, and not a mere easement for the use of the public, is vested in the trustees of a town, such trustees own the coal under the surface of the streets. If that coal has been mined and removed by the lessee of the heirs of the individual who gave the land for the streets to the town, the trustees may waive the tort and sue the heirs for the rental received, as money had and received.

Barton Coal Co. v. Cox, 39, 1 (1873). In an action for trespass for breaking and entering the plaintiffs' close, and mining and carrying away their coal, the proper estimate of damages is the value of the coal per ton after it is severed from its native bed, and before it is put upon the mine cars, without deducting the expense of severing it; and if the defendant knew, at the time the trespass was committed, that the land was not his own, the plaintiffs are entitled to exemplary damages.

If in such an action it be made to appear that the defendant mined out coal from the land, and made excavations thereunder and removed the coal so excavated, and thereby injured the coal left remaining as pillars, or by bad mining or otherwise rendered it difficult or impossible for the plaintiffs to get out or remove such pillars of remaining coal, or rendered it of less value to them, then they are entitled to

recover for such coal as cannot be removed what it was worth per ton in its native bed, and such damages for so much of said coal as can be removed, but with increased expense, as the evidence may show such coal to be diminished in value.

And if the defendant in mining and excavating under the land thereby rendered it more difficult and expensive for the plaintiffs to obtain access to the coal thereunder, and depreciated the value of the remaining coal, the plaintiffs are entitled to such damages as they may have sustained from the depreciation of the land and the increased difficulty and expense of obtaining access to the coal remaining therein.

Franklin Coal Co. v. McMillan, 49, 549 (1878), follows last case, adopting language thereof.

The proper measure of damages is the value of the coal per ton when just severed from its native bed, and before it is put upon the mine cars, without deducting the expense of severing it; and if defendant, at the time of mining and removing the coal, knew that the lands were not his own, such further damages may be awarded plaintiff as the facts and circumstances accompanying said mining and removing of the coal may warrant.

Blaen Coal Co. v. McCulloh, 59, 403 (1882). The general rule in actions of trespass for mining and carrying away coal is, that the plaintiff is entitled, independently of circumstances and aggravations, to recover the value of the coal immediately upon its conversion into a chattel by severance from the freehold, without deduction of the cost of severance.

As the fact to be arrived at is the worth of the coal just after its severance and before the removal is begun, it does not vary the rule of compensation whether its value at that time is ascertained by what it would sell for when brought to the surface, and then deducting the mere cost of bringing it there, or by estimating its worth before it was removed, where it has been taken from the pit and sold.

It is no defence to an action for mining and carrying coal from the land of the plaintiff that the cost to the plaintiff of opening and equipping a mine on his own land, considering the small number of acres in his tract, would be so great as to render his coal valueless. Nor is such a mode of valuation relevant where in fact the coal mined was actually taken off and sold. The question as to what deduction would have been reasonable and fair for the actual expense of loading and hauling the coal from where it was dug to the surface, would have been proper had testimony been offered to show salable value at that point.

Exclusive of the coal carried away, the plaintiff was entitled to damages for the injury done in impairing the worth of the coal that was left, and making it more difficult to mine through destructive and wasteful mode of excavation.

Atlantic Co. v. Maryland Co., 62, 135 (1884). The owner of adjoining property is held to know the boundaries between him and his neighbor. If he has made a mistake *bona fide* as to his title or boundaries in mining coal, the lowest measure of damages applicable is the value of the coal immediately upon its conversion into a chattel without deduction of the cost of severance. If the trespass has been committed through negligence or design, punitive damages, in addition, may be recovered.

Massachusetts. *Dickinson v. Boyle*, 17 Pick. 78 (1835). Where the defendant broke and entered the plaintiff's close lying adjacent to a river, dug into a bank near a dam across the river, and carried away some gravel, in consequence of which a flood in the river, which took place three weeks afterwards, carried away a portion of the close and a cider mill, etc., belonging to the plaintiff, it was held that the plaintiff might recover damages for the whole of such injury, in an action of trespass *quare clausum fregit*.

"Where the act complained of is admitted to have been done with force, and to constitute a proper ground for an action of trespass *vi et armis*, all the damage to the plaintiff of which such injurious act was the efficient cause, and for which the plaintiff is enabled to recover in any form, may be recovered in such action, although in point of time such damage did not occur till some time after the act done."

Arnold v. Richmond Iron Works, 5 Cushing, 502 (1850). The plaintiff, who was the lessee for years of an ore bed, having entered into an agreement under seal, to supply the defendant with a specified quantity of the ore annually at a certain price, with a stipulation that if the plaintiff should at any time refuse or not be able to dig or raise the ore at a fair price, the defendant should have liberty to employ others to dig or raise it for him; it was held that the plaintiff, if he should neglect to raise or dig the ore, according to the terms of the lease, could not maintain an action of trespass on the case, sounding in tort, against the defendant, for entering the premises and digging and carrying away ore. "What rightful claims the plaintiff may have against the defendants for ore taken from either or both of these ore beds, or in what form such claims may properly be asserted and enforced, it is not necessary now to decide or consider. The decision in the present case is that this action, sounding in tort, cannot be maintained."

Stockbridge Iron Co. v. Cone Iron Works, 102, 80 (1869). Where a lease of the right of digging ore on certain land for a number of years on royalty had been forfeited for breach of condition, the lessees having been notified thereof and the lessor having entered for the breach and determined the lease; in an action of tort for injury to this land by digging a shaft on adjoining land, occupied by the defendants, and thence excavating drifts and openings into the plaintiffs' land and taking therefrom large quantities of iron ore, the measure of damages is the value of the ore as it lay in the bed, and not as it was after its value had been increased by the trespassers raising it to the surface. To this is to be added the damage done to the real estate.

Michigan. *Hartford I. M. Co. v. Cambria M. Co.*, 93, 90 (1892). The rule of damages adopted was sufficiently favorable to the defendant. The plaintiff was allowed to recover the value of the ore mined, less the actual cost of producing it, and less the royalty which was paid by the defendant to the owner.

Missouri. *Austin v. Huntsville Coal & M. Co.*, 72, 535 (1880). An instrument which purports, in consideration of a fixed annual rent, to lease and convey for a certain time all the coal on or under certain land is a lease. It authorizes the lessee to take out all the coal he can mine on the premises during the term, but is not a

grant of the coal in the land. Where the lessee under such a lease does not enter upon the land, he has a mere *interesse termini*; he does not acquire possession of the mine or property in the coal, and the lessor may maintain trespass against one wrongfully mining thereon. The existence of the lease is no defence to such an action, nor is a settlement with such lessee. Even if there had been an entry by the lessee, the lessor might have based his action on the permanent injury to the freehold consequent upon taking large quantities of coal therefrom. The recovery of a judgment for rents by the lessor against the lessee did not vest the property in the coal in the lessee, the recovery being upon the terms of the lease, not upon entry. This is true whether the judgment be satisfied or not.

In an action for wrongfully mining and taking coal from plaintiff's land, if it be shown that the defendant's act was not wilful, the measure of damages is the value of the coal in place; that is, the value at the mouth of the shaft, less the cost of severing it from the freehold and delivering it at the mouth of the shaft.

Henry v. Lowe, 73, 96 (1880). The statute gave treble damages against any person who shall "dig up, quarry or carry away any stones or ore, mineral, gravel, clay or mould, roots, fruits or plants from land of another." This includes coal, which is a mineral.

Montana. *Blue Bird M. Co. v. Murray*, 9, 468 (1890). One who in mining enters the side lines of the location of another is *prima facie* a trespasser.

Nevada. *Waters v. Stevenson*, 13, 157 (1878). In trespass for ore extracted from plaintiff's mine by defendant, who committed the trespass ignorantly and innocently, in measuring the damages the defendant is entitled to have the necessary cost of mining deducted from the gross yield of the ore. It was error to confine the evidence to proof of expense necessarily incurred after the ore had been picked down upon the floor of the mine.

W., the plaintiff, had leased the mine to A. on royalty. A. subsequently assigned the lease to W., and also his claim against S., the defendant. *Held*, W. stood in the same relation to S. as his assignor A., and the latter was not entitled to deduct the amount of the royalty from the damages for the ore taken.

Patchen v. Keeley, 19, 404 (1887). In trespass *q. c. f.* for digging and removing ore, plaintiff is confined in damages to the value of the ores taken.

Plaintiff was not bound to prove discovery of a lode. As against a stranger possession is sufficient to maintain trespass, — the same possession as if the land were farming or timber land. The location of the claim need not be proved.

The fact that defendant only took screenings would not justify a non-suit. Even if they did not pass by the location, the plaintiff was entitled to nominal damages for the trespass on his possession. If defendant was a wilful trespasser, no deduction for working expenses is allowable.

New Jersey. *Shaw v. Wallace*, 25 Law, 453 (1856). A contract to raise ore, not less than a certain amount per annum, from the mines on certain land, for which the contractor is to receive a certain sum per ton, is to have tools furnished, and the use of the

land and buildings, may be construed as a lease of the surface, the lessee paying rent by labor in the mine. Under this contract the contractor has a right to exclusive possession of the land and of the mines, and may maintain trespass against the owner or his assignee for entering upon the land, opening a new mine, and mining ore. But there was no damage done the plaintiff unless this action of the owner interfered with his operations.

Thomas Iron Co. v. Allentown M. Co., 28 Eq. 77 (1877). Where the owner of mineral lands suspects that the adjoining owner has mined over the line and has taken minerals from the land of the former, and refuses to allow him to enter the mine to make an inspection of the fact, equity will grant an order of inspection.

New York. *Hoy v. Smith*, 49 Barb. 360 (1867). A person wrongfully raised ores and minerals from lands situated in another State, and sold and converted them. Subsequently the owner of the land conveyed it to the plaintiff, and sold and assigned to him the ores and minerals so raised and converted. The latter can maintain in this State an action for the wrongful raising and conversion of these ores. "Such an action is assignable, and may be prosecuted in the courts of this State. The possession of the land has nothing to do with the question before us."

Baker v. Hart, 52 Hun, 363 (1889). Plaintiffs held certain lands under a lease, which gave them the exclusive right to the premises, and the sole and exclusive right to quarry and remove stone therefrom during the term. In an action against the lessees of an adjoining lot, who had entered upon plaintiffs' quarry and taken out a quantity of stone, it was set up as a defence that under their lease plaintiffs had only a right to stone which they took out themselves, and could not maintain the action. This was held not to be a good defence.

The plaintiffs had an interest in all the stone in their quarry, that being their only source of profit under their lease. The measure of damages was the value of the stone taken out, after it was cut by the defendants and removed to its place of destination. Plaintiffs were not limited to the value of the stone in place.

Hughes v. United Pipe Lines, 119, 423 (1890). Oil in the earth belongs to the owner of the land, and when taken therefrom by a wrongdoer, his title to the same still remains perfect, and he can pursue and reclaim it wherever he can find it, as in the hands of the bailee of the trespasser, as was the case here.

Ohio. *Williams v. Pomeroy Coal Co.*, 37, 583 (1882). In the application of the Statute of Limitations there is no distinction between trespasses on the surface and under ground.

The lessee of a coal mine made excavations over the line under the land of the adjoining owner. After the expiration of the lease, and seven years later, the adjoining owner in working his mine reached these excavations, of which he had not known before, and tapped the water of the other mine, whereby his own mine was injured. The statute barred an action for damages.¹

¹ The law of Ohio as stated in this case has been changed by Rev. Stats. 1890, sec. 4982.

Pennsylvania. *Muther v. Trinity Church*, 3 S. & R. 509 (1817). Trover will not lie against one in adverse possession of land for stone taken therefrom. It is not a proper form of action in which to try the title of land.

"That the law draws the possession to the property, of personal chattels unconnected with the land, may be true, and yet it does not follow that the possession is drawn in like manner, to the property of that kind of chattel, which was part of the soil until severed from it; when the soil itself at the moment of severance was held by another. I should rather suppose that in such case he who had possession of the land had possession also of the stones dug from it, and against him, another, who had the *right to the possession of the land*, could not support trover. He certainly could not support *trespass*. But he would not be without remedy; for he might first recover the possession by ejectment, and then recover the mesne profits in an action of trespass." Tilghman, J.

Lyon v. Miller, 24, 392 (1855). In covenant on a lease, whereby the lessee was given the right to dig and mine coal south of a designated line, the lessee to pay a certain sum for every bushel he may mine or dig upon said land, the lessors could not recover for coal mined north of the designated line; and that they were owners of that land was immaterial. For that they have their remedy by trespass.

Dundas v. Muhlenberg, 35, 351 (1860). The lessors of a coal vein who participated in the expense of working the same are liable as co-trespassers for the act of their tenant, who in working the vein took coal from the land of the adjoining owners. The latter may waive the tort and recover from the lessors in *assumpsit* for the coal so mined.

Forsyth v. Wells, 41, 291 (1861). Trover lies for coal mined upon and carried away from another's land by mistake.

The measure of damages in such case, in the absence of negligence or intentional wrong, is the fair value of the coal in place, and such injury to the land as the mining may have caused. Trespass also lies in such a case, but may be waived and trover maintained.

Blair Iron Co. v. Lloyd, 1 Walker, 158 (1874). A mining company is liable for the negligence of its engineer in mining beyond its own land. If such trespass is committed ignorantly, the measure of damages is the value of the ore in place. If wantonly, the damages may be compensatory for the wanton wrong.

Ege v. Kille, 84, 333 (1877). Action for mesne profits of coal land. Where defendants have acted in good faith in working the mines and removing the ore, they are chargeable for the latter only with its value in place. The value of the ore in place is to be ascertained by deducting the cost of mining, cleansing and delivering the ore in market from its market value thus delivered.

Freck v. Locust Mt. Coal Co., 86, 318 (1878). Where a party is the lessor of two adjoining mines, the rule governing adjacent mines, when held by different owners, that the lessee must ascertain the dividing line at his peril, does not apply, for the lessor, having the power to protect himself by covenant, if he neglects to do so, cannot plead rules resulting *ex necessitate*, as against his own grant.

Where the lessor not only gives his tenant the power, but makes it

his duty, to explore and mark a theoretical line upon his own premises, the tenant cannot be treated as a trespasser, if in an honest attempt to ascertain the line he should chance to pass over it. In such a case the lessor can only recover damages for improper mining or criminal negligence. He might, however, if the coal so mined was on a tract where a larger royalty was paid, recover the increased royalty.

Oak Ridge Co. v. Rogers, 108, 147 (1884). Under the act of May 8, 1876, the measure of damages is based upon the fair value of the coal in place. If the evidence fails to give its value in place, then the measure should be based upon what it was worth at the pit's mouth or in a distant market, deducting therefrom what it would cost to put or take it there.

National Transit Co. v. Weston, 121, 485 (1888). The true owner of land may not sustain trover for the value of oil, or other products of realty, produced and removed from the premises in the exercise of a colorable title, without fraud or force, by one in adverse possession.

The act of May 15, 1871, P. L. 268, authorizing replevin for chattels severed from realty, though the title be in dispute, is limited to that form of action, and the only other proper remedy remaining to the owner is ejectment and proceedings for mesne profits.

Phillips v. Coast, 130, 572 (1890). If a person while in possession of oil land, believing he has a valid title thereto, in good faith drills a well thereon, he has a right, if the land be afterwards recovered from him in ejectment, to retain out of the proceeds of the oil produced during his occupancy a sum sufficient to reimburse him for the cost of drilling the well. He is entitled to this sum out of funds in the hands of a receiver appointed to take charge of the well pending the ejectment.

Palmer v. Truby, 136, 556 (1890). The lessee of land, demised for the production of petroleum alone, who obtains gas but not oil, and is thereupon dispossessed by ejectment brought upon an alleged forfeiture, has no equity to be reimbursed the expenses of his operations out of the proceeds of the gas obtained.

Duffield v. Rosenzweig, 144, 520 (1891), 150, 543 (1892). Plaintiff had a lease of land for oil-mining purposes, with the exclusive right of boring for oil thereon, and with a restriction to certain sites in his operations. He was held to have the protection of the entire tract, and could maintain an action on the case against one who bored for oil on the land not included in the designated sites. The measure of damages was the difference in value of the leasehold before and after the injury was committed.

Commonwealth v. Steimling, 156, 400 (1893). One who severs coal from the freehold *animo furandi* and carries it away, is guilty of larceny. The act of carrying away may be separated from the severance, and is not to be considered as one and the same continuous act, — a mere trespass.

Lewej v. Fricke Coke Co., 166, 536 (1895). Plaintiff owned a lot under which lay coal, which he had made no attempt to mine. Defendant owned land adjoining, and in its mining operations in 1884 mined across a part of plaintiff's lot. This was not discovered by plaintiff until 1891. He then brought suit, and it was held that he

was not barred by the Statute of Limitations. The statute ran from the discovery of the trespass.

Williams, J.: "The interior of the earth is invisible and inaccessible to the owner of the surface unless he is engaged in mining operations on his own land; and then he can reach no part of his own coal stratum except that which he is actually removing. If an adjoining landowner reaches the plaintiff's coal through subterranean ways that reach the surface on his own land and are under his actual control, the vigilance the law requires of the plaintiff upon the surface is powerless to detect the invasion by his neighbor of the coal one hundred feet under the surface." Defendant "was bound to know its own lines and keep within them. If by mistake or for any other reason it did invade the mineral estate of another and remove and appropriate the coal therefrom, good conscience required that it should disclose the fact and pay for the coal taken. Its failure to do this is in its effects a fraud upon the injured owner, and if he has no knowledge of the trespass and no means of knowledge, such a fraud, whether it be called constructive or actual, should protect him from the running of the statute."

Giffin v. South West Pa. Pipe Lines, 172, 580 (1896). Trover will not lie for chattels severed from the soil, while it, at the moment of severance, was in the adverse possession of another. A part owner of oil land cannot maintain assumpsit against a pipe line company to recover the value of oil delivered to the company by a person in possession and holding adversely to the plaintiff.

South Carolina. *State v. Guano Co.*, 22, 50 (1884). The fact that the State has granted the right to one corporation to dig and mine for phosphates in a navigable stream, does not prevent the State from bringing an action to assert its title to the soil against another corporation which has mined such phosphates. The value of the phosphates taken by the defendant corporation from the soil of the State should be estimated at the value of the phosphates, less the amount defendant has added to their value by their removal and preparation for market, defendant having acted under an honest but mistaken belief in its right to these phosphates.

Tennessee. *Coal Creek Mining & Mfg. Co. v. Moses*, 15 Lea, 300 (1885). It is the duty of a person mining on his own land near the boundary line to make a survey to prevent encroachment on the adjoining land, and to keep accurate accounts of the coal mined near the line; and if he fails to do so, the evidence as to the quantity of coal taken will be construed most strongly against him, and the least evidence of bad faith on his part will cause every intentment to be made in favor of the injured party. But if the trespass was unintentional and inadvertent, the measure of damages is the value of the coal *in situ* before the trespass, and the incidental injury, if any, to the land by the taking or mode of taking. This rule prevails both at law and in equity. The court below had stated the measure of damages to be the value of the coal at the pit's mouth, less the cost of transporting it there from the place where dug. This was reversed.

Ross v. Scott, 15 Lea, 479 (1885). One who has mined coal under

an honest claim of title to the land is, in the absence of special damage to the land, liable for the value of the coal *in situ* before the trespass. This value is the royalty usually paid by lessees for the right of mining.

Dougherty v. Chestnut, 2 Pickle, 1 (1887).—Where a trespasser, under an honest but mistaken claim of title, has invaded a marble quarry, and removed and sold stone, the measure of damages against him is the value of the marble as it lay at the quarry, cut, dressed, and prepared for market, less the actual, in no event to exceed the usual and reasonable, cost of quarrying and preparing it for market. The rule laid down in *Ross v. Scott*, *supra*, could not be applied in this case because of the injustice that would arise from its particular circumstances. The action was by the assignee of a lease against the assignee of the lessor, the consideration of the lease being \$20 per annum and five cents per cubic foot for all marble quarried.

Where the trespass is malicious or wilful, the measure of damages is the value of the mineral after severance, without compensation for mining or preparation for market.

Jackson v. Walton, 28, 43 (1855). The right of the owner of personal property to reclaim it, if he can identify it, does not exist when the property has been annexed to another person's freehold, and becomes a part of the realty. The principal defendant quarried, dressed, sold, and delivered to the trustee a quantity of granite, and laid it down for a permanent walk on the trustee's premises. He obtained the stones without right from the quarry of a third person, who, after the walk was laid, claimed them as his property. *Held*, that the property in the stones was in the trustee after they were laid in the walk, and that the trustee was indebted to the principal defendant and liable as his trustee, at least for the increased value of the stones, which was produced by their being quarried, dressed, and delivered.

CHAPTER XXIII.

EQUITABLE PRINCIPLES AND REMEDIES IN THEIR APPLICATION TO MINES.

I. Fraud.
II. Injunction.

III. Receivers.
IV. Inspection.

I. FRAUD.

Misrepresentation in the Sale or Purchase of Mines and Mineral Lands.

THE principles of equity applicable to representations made by buyer or seller which induce the other party to complete the bargain, are the same in the case of mines as of other real estate. But as minerals are from their nature peculiarly apt to be the subject of fraudulent transactions, it is thought desirable to collect the cases upon the subject, in which actual or alleged mineral lands have been the subject of sale. It is our purpose to state here only the general principle. The reader is referred to the cases abstracted below for the applications of this principle.

A rescission of the contract may be made or will be decreed, or an action of deceit may be maintained where the contract was induced by fraudulent and false representations. In order to establish that a representation was of this character, it must appear (1) that it was of a fact, not a mere expression of opinion; (2) that it was false in itself; (3) that it was false to the knowledge of the party making it, or made in reckless disregard of whether it was true or false; (4) that it was of a material fact; (5) that it was made with the intent that it should be acted upon; (6) that it was acted upon to the damage of the person relying on it; (7) that that person so acted in ignorance of its falsity, and reasonably believing it to be true.

It should be added to the above that the existence of minerals in land is a material fact, unless it can be shown that it was treated otherwise by the complaining party.

There is, however, no obligation on the part of either seller or buyer to speak. If, therefore, no confidential relation exists between them, it is not fraud if the buyer conceals from the seller his knowledge of the existence of mines, of which the latter is ignorant. But if the buyer should make representations for the purpose of misleading the seller, he will be subject to the same rules as the seller.

Where, however, there exists between the parties a fiduciary relation, as of partners, or of principal and agent, then there is an obligation to disclose all material facts, and silence or concealment thereof will constitute fraud.¹

United States. *Hicks v. Jennings*, 4 Fed. 855 (1880), C. C. N. D. Ga. In treating for the purchase of a tract of land, the seller represented that it contained a valuable silver mine, and was worth from \$15,000 to \$20,000, saying that he had had an assay made, and that the land was rich in silver; whereupon the other bought the land for \$10,000, and it was then discovered that it had no silver in it, and was worth but \$500 or \$600. These facts constitute such fraud and want of consideration as to be a good defence to an action to foreclose a mortgage for purchase money, if brought by the mortgagee himself.

Southern Development Co. v. Silva, 125, 247 (1888). Statements made by the seller of a speculative property like a mine, at the time of the contract of sale, concerning his opinion or judgment as to the probable amount of mineral which it contains, or as to the character of the bottom of the ore chamber, or as to the value of the mine, if they turn out to be untrue, are not necessarily such fraudulent representations as will authorize a court of equity to rescind the contract of sale. Nor will the fact that there were drill holes in the wall of the mine, which had been filled up, and which if open would have revealed the nature of the deposit of ore, if the seller did not know of them and showed the buyer all the operations in the mine of which he knew, amount to a fraudulent concealment.

Lamar, J.: "In order to establish a charge of this character, the complainant must show by clear and decisive proof:—First, that the defendant has made a representation in regard to a material fact; Secondly, that such representation is false; Thirdly, that such representation was not actually believed by the defendant on reasonable grounds to be true; Fourthly, that it was made with intent that it should be acted on; Fifthly, that it was acted on by complainant to his damage; and, Sixthly, that in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

Daniel v. Brown, 33 Fed. 849 (1888), C. C. D. Colo. The plaintiff

¹ In Wyoming, salting mines or placing upon or in land metal or material representing genuine mineral, with the purpose of cheating or deceiving others for gain, is made a crime by Laws of 1888, ch. 40, sec. 11. To the same effect are Arizona, Act March 14, 1895, p. 34; and Montana, Crim. Code 1895, secs. 942-4.

alleged in his bill that defendants, having discovered rich ore in a mine partly owned by him, fraudulently concealed this fact from his agent, who was also co-owner, and thereby induced the latter to sell plaintiff's interest in the mine for much less than its real value, at the same time purchasing the agent's interests in the same mine for a sum certain, with the promise of additional compensation to the agent, conditioned on the value of the ore they might take out. *Held*, that if these facts should be proved, the deed would be avoided.

Bowman v. Patrick, 36 Fed. 138 (1888), C. C. E. D. Mo. The managing partner in a mine, having actually concealed from his co-partner the fact that valuable ore had been found during the latter's absence, and having misled him as to its true condition by letters in which he concealed this fact, a sale by the latter to the former at a grossly inadequate price will be set aside as fraudulent.

Where the persons dealing with one another, are one absent, and the other present and in sole charge of the business by arrangement with his partner, the rule is that "in order to sustain such a sale it must be made to appear, first, that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchased; and, second, that all the information in the possession of the purchaser which was necessary to enable the seller to form a sound judgment of the value of what he sold should have been communicated by the former to the latter."

Patrick v. Bowman, 149, 411 (1893). The decree in the last case was reversed on the ground that the parties had reached an understanding as to the terms of the sale, and the contract between them was actually completed before the discovery of the ore. Fuller, C. J., and Brewer, J., dissenting.

Lehigh Z. & I. Co. v. Bamford, 150, 665 (1893). In an action for royalties the defendants alleged and gave evidence to prove that at the time of making the lease the mine was flooded so that they could not examine it, and plaintiff represented that the mine was valuable, would produce a large amount of zinc and other ores, and would be a profitable investment. "The court said, in substance, that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity; that deceit may also be predicated of a vendor or lessor who makes material untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon, by the purchaser or lessee, the truth of which representations the vendor or lessor is bound and must be presumed to know. Touching the alleged representations as to the value of the leased property, the court said that general assertions by a vendor or lessor, that the property offered for sale or to be leased is valuable or very valuable, although such assertions turn out to be untrue, are not misrepresentations amounting to deceit, nor are they to be regarded as statements of existing facts upon which an action for deceit may be based, but rather as the expressions of opinions or beliefs, that

as a general rule fraud upon the part of a vendor or lessor, by means of representations of existing material facts, is not established, unless it appears such representations were made for the purpose of influencing the purchaser or lessee, and with knowledge that they were untrue: but where the representations are material, and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is bound to know, or is presumed to know, his actual knowledge of them being untrue is not essential. We perceive no objections to these instructions."

Mudsill Min. Co. v. Watrous, 61 Fed. 163 (1894), C. C. Ap., 6th Circ. Bill in equity for rescission of sale of real estate. V., one of the defendants, an experienced miner, represented to M., the complainant's agent, also an experienced mining engineer, that the development of the property showed thirty thousand tons of ore in sight, and "that an average assay of the ore taken from different parts of the mine, so far as opened, showed thirty-five ounces of silver to the ton," and V. also stated "that his own estimate, based upon his own knowledge of the mine, was that the real average throughout the whole vein was not less than thirty-five ounces per ton." M. examined the mine, and took samples for a test. This test was made in V.'s mill, and in the presence and with the assistance of V., who had an opportunity to interject native silver without being observed. This test showed thirty-four ounces to the ton. After the sale, no ore was found in the mine to produce more than seven ounces. It was also shown that V. had tampered with samples taken by other prospective purchasers for the purpose of making tests, and had stated the results of these tests to M. as inducements to purchase. A rescission of the contract was decreed.

Lurton, Circ. J.: "A misrepresentation, in order to constitute fraud, must be an affirmative statement of some material fact, and not a mere expression of opinion. The distinction between the misrepresentation of a fact and the expression of an opinion is peculiarly applicable in the sale of a property so speculative and uncertain as a silver mine." But "if the party making false statements as to a matter conjectural in its character, and therefore relating to a matter of opinion, actively intervene to prevent investigation and the discovery of the truth, and such intervention be effective in the concealment of the facts and in the deception of the buyer, a clear case of operative fraud is made out. In every such case immunity will not be extended to false expressions of opinion upon the ground of 'puffing' or 'trade talk,' if it appear that the vendor has by his conduct prevented investigation and induced reliance upon the statements of the seller. In such a case, the subsequent conduct of the seller in actively preventing the buyer from the formation of an independent opinion so connects itself with the original misrepresentation as to become a part and parcel of the false statement, and amounts in law to the false affirmation of a fact. A false representation may, and most often does, consist in language alone, expressed or written; but it may also consist in conduct alone or external acts. . . . The *gravamen* of the alleged fraud lies in the allegation that when the complainants undertook to examine this property, and form an independent judgment as to its value, through the active

and wilful intervention of defendants their samples were rendered untrustworthy by the secret admixture of silver, in a form in which it did not exist in this mine; that the purpose was to give to these samples, otherwise representative of the average value of the ore in sight, a false and fictitious value, which would confirm the untrue statements expressed theretofore as to the silver contents of the mine.

"Now, it must be evident that if this was done, a most abominable fraud was practised, and that no court would suffer a contract resting upon such a foundation to stand."

The circumstances were sufficient to justify the finding that the ore was "salted" by V.

California. *Davidson v. Jordan*, 47, 351 (1874). Representations as to the value of a mine, the amount and value of ore extracted and on hand, the supply of water and wood, if held out by the seller of an interest in the mine to the buyer as the statements of other persons whose names he gave, the seller not professing himself ever to have seen the mine or to have any general knowledge of its value, are not fraudulent and will not avoid the sale, unless the seller knew, or had reason to believe, them false.

Colorado. *Jennings v. Rickard*, 10, 395 (1887). Plaintiff and two defendants formed a prospecting partnership, by which plaintiff was to furnish the money and defendants do the active work in the field. Defendants located claims in their own names, and reported them to plaintiff as belonging to the partnership. They then bought out his interest therein at an agreed price, not disclosing an offer at a higher price which had been made to them by a stranger. Afterward they sold out on this offer. This was held to be in fraud of plaintiff, who was entitled to recover his proportion of the excess in price received for the claim.

Georgia. *Leonard v. Peeples*, 30, 61 (1860). In an action on a promissory note given for part of the purchase money of a mine, it was error to charge "if the plaintiff represented the mine sold to be a good one (he being a miner and having an opportunity of knowledge), and Peeples had not seen and examined it, and these representations were the inducement to purchase, then it was wholly immaterial whether the representations were fraudulently made or by mistake. The plaintiff must suffer the consequences resulting therefrom."

"When one misrepresents a fact, knowing it to be false, or asserts a thing to be so, not knowing whether it be true or not, and it turns out to be false, he is in both of these cases guilty of a moral as well as a legal fraud. But where one honestly believes the truth of what he affirms, he is clearly not guilty of moral turpitude, and I should be slow to convict him of legal fraud, so as to subject him to a liability for the mistake, unless the representations were of a character to amount to a warranty."

"We do not think that the plaintiff was entitled to the second charge which he asked, that 'the sale of gold mines was peculiar, and that representations concerning them are matters of opinion only, and do not amount to a warranty that they are as represented.'"

"This, we apprehend, depends entirely upon the nature of the representations. They may be so positive as to amount to a warranty, and

if so, they stand upon the same footing as representations concerning any other species of property."

Illinois. *Tuck v. Downing*, 76, 71 (1875). On a bill to set aside a purchase of an interest in a mine in Utah, sold in Pennsylvania, on the ground of fraudulent misrepresentations as to the quality and prospects of the mine, it appeared that on the representation of the vendor a committee had been selected, who had personally examined the mine, on the report of which committee the sale was consummated. *Held*, that any extravagant representations of the vendor could only be regarded as the expression of an opinion about a matter of which the committee could judge for themselves, and that they formed no ground for setting aside the contract.

Where the representations complained of are necessarily mere matters of opinion as to the future prospects of a mine, the rule *caveat emptor* applies, and the sale will not be set aside whether the vendee has or has not availed himself of an opportunity to examine the premises.

"It is in proof that, in buying and selling mines, people buy and pay, or agree to pay for them, influenced by the prospect. No man, however scientific he may be, could certainly state how a mine, with a most flattering outcrop or blow-out, will finally turn out. It is to be fully tested and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and every one knows the business is of the most fluctuating and hazardous character."

Indiana. *Arbuckle v. Biederman*, 94, 168 (1883). Where the lessor of a coal mine which he had himself previously worked, and which at the time of the lease was so filled with water as to render examination impossible, makes false statements as to the amount of coal which had been worked, and the amount of water which would have to be removed, and as to the quantity of coal and the condition of the mine, he is liable in an action of deceit by the lessee.

Kentucky. *Bowman v. Bates*, 2 Bibb, 47 (1810). The defendant having discovered salt water on a tract of land in Illinois, belonging to plaintiff in Virginia, by artifice prevented knowledge of the fact reaching the latter until he had been able to purchase the land, which he did at an inadequate price, pretending that he intended to live upon it. The sale was set aside. "In this case, that there was *suppressio veri*, the court is well satisfied, and it is also of opinion that the truth suppressed was material information for the complainant in regard to the subject matter of the contract."

Bowman v. Irons, 2 Bibb, 78 (1810). Where a vendee, as alleged by defendant, having discovered a valuable salt spring on the land, concealed the fact from the vendor, pretending that the purchase was made for the wood on the tract, the price agreed upon being wholly inadequate when the existence of the spring was considered, the vendee further being in default by delay in tender of instalments, it was *held* that vendee was not entitled to specific performance, although his knowledge and concealment of the salt spring was not conclusively shown, as

the delay and inadequacy of consideration of themselves would be sufficient to defeat relief of that kind.

Perkins v. Rice, Littell's Sel. Cas. 218 (1816). Perkins, who had for a considerable time worked a saltpetre cave, sold it to Rice, telling him that the nitrous earth in the cave would yield from three-quarters of a pound to two pounds of saltpetre to the bushel of dirt, whereas, in fact, the cave had become greatly exhausted, and was not capable of producing "anything nigh the quantity" of saltpetre represented. At the same time he informed him that he, the vendor, was not a judge of saltpetre caves, and advised him not to trust to his representations, but to get a competent person and have the cave examined, which Rice accordingly did, and, after such examination and report, became the purchaser. *Held*: 1. That, notwithstanding such inspection, it by no means followed that the false statements of defendant had no effect in inducing the purchase. 2. That the assertions of defendant were of specific facts, distinguishing the case from those instances where the vendor had merely overstated the value of the premises, and amounted to a misrepresentation of a character which would authorize rescission.

Cooper v. Lovering, 106, 77 (1870). This was an **Massachusetts** action to recover the price of oil lands. The defendant alleged that the lands had been sold to him under false representations. It did not appear that the plaintiff had any knowledge of the oil lands, except what he derived from letters received from his brother; or that he made any representation of any kind to the defendant except as to the contents of these letters, and as to the good faith with which they were written.

Ames, J.: "If he intentionally misstated their contents, that would amount to a misrepresentation of a material fact, and would come within the established definition of deceit. If he knew that the information contained in the letters was false, and that the writer was not 'trustworthy and reliable,' it would of course be fraudulent if by words or acts he induced the defendant to act and rely upon them, and to incur damage and loss by such reliance. But if he himself believed the information contained in the letters to be true, and the writer to be entitled to confidence, and if he truly and honestly stated the contents of the letters, and explained to the defendant that he had no other personal knowledge on the subject matter, such representations on the plaintiff's part would not be fraudulent."

Whiting v. Hill, 23, 399 (1871). Where, in defence to **Michigan**, a bill foreclosing a purchase-money mortgage, damages were claimed on account of fraudulent misrepresentations at the time of the purchase of the salt property in question, in substance that the brine was of ninety degrees strength, free from gypsum, and sufficient in quantity to supply three or more salt blocks; and the evidence showed that defendants, pending negotiations, were, for fifteen days after such representations were made, and before they became bound to the purchase, in possession and steadily working the well; that they were familiar with the business of salt making, and had themselves discovered that the brine contained gypsum and was deficient in strength and quantity. — such misrepresentations, if made as alleged, would be no defence to the bill.

Williams v. Spurr, 24, 335 (1872). The vendor, a dealer and speculator in iron mines, had discovered iron ore upon certain lands, and had procured title to them on this account. The vendees, scientific men, had been upon the lands, and discovered that this same ore was of peculiar quality and was of great value. Negotiations were opened for purchase. The vendees pretended that they wished the lands on account of the timber on them. The vendor represented that it was also valuable for iron, and sold it at a price much more than it was worth for timber — much less than it was worth for iron. *Held*, that the vendor had no case to set aside the sale. "On both sides they were dealers and speculators in iron lands; there was no relation of confidence between him and them; they were dealing with each other at arm's length; and the whole course of the correspondence shows that each party expected the other to obtain his own information in his own way, and to decide as to the value at his own risk, and that neither was acting in reliance upon the statements of the other as to the value of the lands."

Bean v. Valle, 2, 126 (1829). "Whoever is at all acquainted with the operations of mining, must know that a man may live on land for half a century, may dig into it often and deep, and discover nothing of value; another may thereafter, or he may himself thereafter, by one day's labor, discover a mine of great value." The fact of valuable lead diggings being opened on a tract within a short time after its purchase is no evidence of a fraudulent concealment of its mineral value by the purchaser. "All the mining that was done on this land before the complainants got it was under the eye and inspection of Bean, from July to November, and then for a short time under the inspection of his agent; and the evidence is that for all this time, till the time of the complainant's purchase, nothing presenting the prospect of much profit had come to light; there is no evidence that the complainants were ever on the land, or had any communication with the agent or diggers belonging to Bean."

Nevada. Fishback v. Miller, 15, 428 (1880). The rule of *caveat emptor* applies only when buyer and seller have equal opportunities of knowledge, and when the defect complained of is patent and obvious to the senses. It does not apply to a case where the seller of a mine makes representations in respect to matters of which the buyer has no knowledge, and no means at hand of obtaining knowledge. The owner of pretended mining ground situate in Nevada offered it for sale to the defendant in San Francisco, and represented falsely that the mine was very valuable, that a shaft was sunk on the lode to the depth of ten feet, and ore taken therefrom would assay \$1,000 per ton; and the defendant, relying wholly on these representations, bought. In such a case he might repudiate the purchase, and having tendered a reconveyance, he could set up the fraud as a defence to an action on a note given for the purchase money.

Gruber v. Baker, 20, 453 (1890). Complainant owned a part interest in a mine, but lived at a distance, and took no part personally in its management. Her brothers, who hauled the ore from the mine to the mill, acted as her agents. A rich vein of ore was discovered, by

which the value of the mine was increased from \$8,000 to \$250,000. The foreman reported the discovery to C., a part owner, and to M., but he covered up the discovery so that it was not seen by the complainant's brothers, who were told that the condition of the mine was not improving. M., who knew these facts, and was kept informed by the foreman, of the development of the vein, negotiated with complainant and purchased her interest. *Held*, to be a fraud, and the deed in the hands of the grantee of M., who had knowledge of these facts, was cancelled in equity.

New Hampshire. *Page v. Parker*, 43, 363 (1861). Parker, who was the owner of a soapstone quarry, conveyed a one-third interest therein to Reding for the sole consideration of his procuring a purchaser for the remaining two-thirds. Parker and Reding then both made statements to the plaintiff that the quarry was worth \$30,000, was a great bargain at \$15,000, with specific misrepresentations as to the produce of the quarry, but concealing Parker's position entirely, and that the only consideration for the whole mine was the price to be paid by the plaintiff for the two-thirds. Plaintiff purchased the two-thirds for \$10,000, which was greatly above its value. A brother of Parker's was also assisting him in the trade, knowing the conspiracy, receiving \$2,000 of the consideration money, but personally made no misrepresentations. In an action to recover the purchase money it was held that there was sufficient evidence against the brother of Parker to justify the refusal of a nonsuit.

New York. *Dale v. Roosevelt*, 5 Johns. Ch. 174 (1821), affirmed in *Roosevelt v. Dale*, 2 Cow. 129 (1823). F. was induced, by the representations of R. that he had discovered a valuable coal mine on the bank of the Ohio River, to purchase the tract of land stated by R. to embrace the mine, paying him therefor \$4,400, and in addition contracting to pay him \$1,000 yearly in quarterly payments. It was provided in the contract that F. should, within a convenient time, begin work on the mine, and if, after scientifically and faithfully working the same, twelve thousand chaldrons were not produced, the annuity was to cease, and any question as to the amount produced was to be decided by arbitrators. It appearing that there was, in fact, no coal mine within the boundaries of the land conveyed, though there was coal adjoining it, in the bed of the river, which was navigable, deep, and rapid, but the working of the mine, if practicable, would be hazardous, expensive, and unprofitable, R. was perpetually enjoined from bringing suit for the annuity.

Livingston v. Peru Iron Co., 2 Paige Ch. 390 (1831). Where the vendee applied to the vendor to purchase a lot of wild land, and represented to him that it was worthless except for the purposes of a sheep pasture, when he knew there was a valuable mine on the lot of whose existence the vendor was ignorant, this was such a fraud as would avoid the purchase. Though the vendee is not bound to reveal his knowledge of the mine, yet if he makes a declaration "with the intention of misleading the seller and preventing him from ascertaining the real situation of the property, and at the same time conceals from him a fact which he knows to be material, he is guilty of a fraudulent deception."

North Carolina. *McDowell v. Simms*, 6 Ired. Eq. 278 (1849). To praise land offered at public sale as valuable for the gold which it contained, when it actually contained none, is not a fraudulent misrepresentation.

Oregon. *Caples v. Steel*, 7, 491 (1879). "A person who knows that there is a mine on the land of another, of which fact the owner is ignorant, may nevertheless buy it without disclosing his knowledge of its existence to the owner, and this will be no fraud on the part of the purchaser. *Fox v. Mackreth*, 2 Bro. C. C. 400; *Fry on Spec. Perf.*, sec. 464; *Harris v. Tyson*, 24 Pa. St. 347. Where, however, one about to purchase a tract of land, wilfully misstates any material fact to the owner, or by any act intentionally misleads him in regard to the value of the land, and through these misrepresentations succeeds in inducing the owner to part with his property for less than its value, a court of equity will relieve him and set aside the contract thus made as a fraudulent transaction."

"The case of *Bowman v. Bates*, 2 Bibb, 47, has been referred to by counsel for respondent as analogous to the one under consideration. We do not so regard it. There the purchaser, who had discovered a salt spring on a tract of land in Kentucky, by artifice prevented the agent of the vendor, who was aware of the fact, from giving that information to his principal, and then sent his brother to Virginia, where the vendor resided, and bought the land at much less than its actual value. It was the deception practised upon the vendor and the misrepresentations made to him that constituted the fraud for which the deed was very properly set aside."

Wimer v. Smith, 22, 469 (1892). Defendant resisted the foreclosure of a purchase-money mortgage of a mine on the ground that the purchase was induced by fraudulent representations by plaintiff. The evidence showed that, before the purchase, defendant, in company with an experienced miner, examined the mine for several days; that he afterwards stated that he bought on his own judgment and that of the expert; that after the purchase he surveyed and worked the mine for nearly two years before executing the notes and mortgage, and made no complaint until plaintiff threatened to bring this action. *Held*, the evidence justified the finding that defendant did not, in making the purchase, rely on plaintiff's representations.

Pennsylvania. *Fisher v. Worrall*, 5 W. & S. 478 (1843). A misrepresentation by a vendor of an occult quality in land (the existence of iron ore), although made in ignorance of the truth and although the vendee agrees to take the risk, is a good defence to an action for specific performance. "Undoubtedly a vendor may praise to the most extravagant extent, qualities which are susceptible of inspection; but a misrepresentation of an occult quality, in regard to which the vendee is not supposed to buy on his own judgment, would be followed by very decisive consequences." Gibson, C. J.

Harris v. Tyson, 24, 347 (1855). It is not fraud for a purchaser of a tract of land not to communicate to the seller his knowledge of the existence of a mine on the land of which the latter is ignorant; otherwise of misstatements wilfully made by the purchaser in regard to the value of the minerals, by which the seller was misled and induced to sell at a lower price than he otherwise would have done.

Watts v. Cummins, 59, 84 (1868). The assertion that land is "oil territory" is not a representation that it will produce oil, but that it is within the oil region, and would from its circumstances be likely to produce oil. It is an expression of opinion. Such an assertion made by the agent of the owners of land, whereby another was induced to purchase a share therein, is not a fraud and does not avoid the contract, where "the existence of oil within the lands of the tract was unknown to all parties, and was ascertainable only by actual development, an expensive and tedious process."

Weist v. Grant, 71, 95 (1872). W., without inspection, bought of H. certain silver mines which the vendor represented would yield from \$133 to \$145 per ton. By the agreement of sale the first instalment of the purchase money was to be paid after a satisfactory report by a certain assayer, which report was to be subject to the approval of the vendees, who, if they did not approve it, might avoid the contract. The report was made; W. paid about half the purchase money. By actual assay the ore yielded \$50 to the ton. Weist was held liable for the balance of the purchase money, unless the misrepresentation was shown to be intentionally false. His acceptance of the assayer's report closed his mouth against alleging misrepresentation in the inception of the contract.

Lynch's Ap., 97, 349 (1881). A court of equity will not decree the rescission of a sale of the coal lying under a tract of land on the ground of misrepresentation as to the existence of coal made by the seller's agent, when it does not appear that either the agent or his principal knew the statement to be a misrepresentation. Where there had been no development of the land to test the existence of coal, the assertion by the agent, who professed a familiarity with coal lands, that there were three underlying veins of coal was a mere expression of opinion upon which the vendee relied at his own risk.

Foster v. Weaver, 118, 42 (1888). Plaintiff and defendant were tenants in common of an oil lease. By gross deception as to the productivity of the land and undervaluation, the latter induced a sale by the plaintiff of his interest to a secret agent of the defendant. Subsequently, on demand by the plaintiff, a reconveyance was made to him. In an action by him for his share of the oil produced and converted by his co-tenant while in possession, he is entitled to recover the value of the oil in the tank, without deduction for the expense of production. Where possession of land is obtained from the owner tortiously or by fraud, no change in the character of any mineral or property taken therefrom by the trespasser or wrongdoer can defeat the right of the real owner to recover it or its value.

Neill v. Shamburg, 158, 263 (1893). A person about to purchase an oil lease is not bound to disclose to his vendor facts in regard to the production of oil on a neighboring leasehold which he owns, and the failure to disclose such facts is not fraud.

Rorer Iron Co. v. Trout, 83, 397 (1887). Persons seeking to lease the privilege to mine upon certain land for twenty years upon royalty were alleged to have represented as inducements to the lessor that they were about to engage on a large scale in the business of mining, transporting to market, and selling iron ores; that

Virginia.

they had made, or were about to make, extensive preparations; that they intended to set to work a large force, and employ twenty wagons to haul ore; that their preparations would enable them to transport and ship as much as one hundred to five hundred tons per day; and that lessor's bonus would yield at least \$10 a day. This was *held* not to be a mere expression of opinion, but a representation of material facts, which, if falsely and fraudulently made, would avoid the lease.

West Virginia. *Davis v. Henry*, 4, 571 (1871). A contract of sale was induced by representations that vendor in boring for oil had, at the depth of one hundred and eight feet, struck a vein of asphaltum coal from seven to nine feet thick, and had also in the well a "show of oil," which representations were fortified by pieces of asphaltum coal, brought from elsewhere and scattered about the oil well, and by a bottle containing a "show of oil." *Held*, unconscionable and avoidable until knowledge of the fraud, and ratification after such knowledge.

"Without going into detail, it seems to me the weight of the evidence is against Henry; that he obtained the first contract from Davis through artifice and misrepresentation is, from the depositions, unquestionable. That it was such a fraud as could not have been detected by any reasonable diligence on the part of Davis, a ruse so studied, and an imposition, though gross, yet so well concealed, was well calculated to deceive the most vigilant and discreet, especially at a time when the wonderful mineral developments of the country were so exciting."

Wisconsin. *Law v. Grant*, 37, 548 (1875). Plaintiff sold defendant land for \$40,000, of which \$25,000 was secured by mortgage. The tract was worth about one-third the purchase money. Defendant had been induced to purchase by extravagant assurances of the existence of mineral, but after much expenditure no mineral at all was found to exist on the land. These representations were made by a party who professed to be able to detect the presence of mineral by the "impressions produced by passing over the place," and a spiritual medium had advised the purchase. The vendor, from the evidence, appeared to have known of the influences at work upon the purchaser, and to have taken advantage of them to ask an extravagant price for the land; but aside from this no fraud was brought home to the plaintiff. In a suit to foreclose the mortgage, it was *held* that these facts did not constitute a defence.

II. INJUNCTION.

The remedy by injunction is most frequently sought after, in connection with mines and mining, to restrain the trespass of mining upon land alleged to be that of the party who complains, and in these cases the remedy has a special application. The ground upon which at the present day an injunction is granted to restrain or prevent a trespass is, that the trespass is threatening irrepar-

able injury, that the remedy at law is inadequate, or to prevent a multiplicity of suits.¹

While few trespasses upon agricultural land could be brought within these limitations, almost every trespass which is accompanied with the carrying away of minerals furnishes ground for an injunction. In all cases of minerals, when the party is a mere trespasser, or when he exceeds the limited rights with which he is clothed, an injunction will issue upon the ground that the acts are, or may be, an irreparable damage to the particular species of property.² The act of trespass consists of taking away the very substance of the estate, that which cannot be replaced. This is particularly the case in trespasses upon mines of the precious metals, which may be removed without leaving any evidence of the quantity or value of the mineral taken. * On the other hand, the right of equity to interfere is not taken away by proof that the value of the mineral taken could be easily estimated, as in the case of a quarry or coal mine. The taking away of the minerals is, in itself, an irreparable injury. If, however, it does not appear that the mineral is of any particular use or value, as might be the case of certain masses of rock, an injunction will be denied, as the replacement would be unnecessary to the preservation of the rights of the complainant, and the injury, therefore, not irreparable.

While it is generally said that the very taking away of minerals from the land is an irreparable injury, it has been held in Nevada and Utah that a mere allegation of irreparability of the injury is insufficient. It must be affirmatively shown why it would be so, by stating facts from which the court can draw the inference. Recently in Pennsylvania it has been held that the injury arising from boring for oil, where the title thereto is in dispute, cannot be irreparable where the oil goes through a pipe line controlled by third parties, for the reason that the amount of oil taken out can be ascertained.

In a bill for injunction to restrain a trespass upon mines, an allegation of insolvency of the defendant is unnecessary, though, where the relief on other grounds would be questionable, the defendant's insolvency would be an important fact in determining the right to the remedy. It would seem from the language of the

¹ Bispham's Principles of Equity, secs. 435-7. by statute in New Mexico, Act March 18, 1897, ch. 58, sec. 5.

² The remedy by injunction is given

court in *Leitham v. Cusick*, 1 Utah, 242, that in that State the insolvency of the defendant is an element in the establishment of the irreparability of the damages.

The possessory owner of a mining claim has a title which entitles him to maintain a bill for an injunction for trespass thereon.

Where the title is in dispute, there is some conflict as to the power of equity to interfere to restrain the party in possession. The Supreme Court of the United States has endorsed the practice of issuing an injunction where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, though the title to the premises be in litigation. And even when the title, though in dispute, was not yet litigated, an injunction was granted in the circuit court of the California district when the mischief was irreparable and imminent, the bill alleged fraud in the execution of the papers upon which defendants based their title, and the latter affirmed their genuineness only on information and belief.

In cases of this character the solvency of the defendant becomes important, and where it is shown, and the injunction may cause him an injury, it will be denied.

It has been said by a Pennsylvania court that an injunction may issue when a dispute of title exists under peculiar circumstances: "The right to judge of those circumstances, and to interfere, if necessary, for the preservation of the property, is in courts of equity. What the peculiar circumstances must be, it is, of course, impossible to define. They will differ in each case. Doubt in the mind of the judge whether a defendant is not transgressing the right claimed by him, seems to be one. Attempting collusions with the tenants of the plaintiff is another. Inability on the part of the plaintiff to resort to law is another. Whatever will satisfy a court that the threatened mischief ought to be prevented until the title be ascertained, warrants interference to prevent destruction of the subject of dispute until the controversy be determined."¹

In the absence of such peculiar circumstances the general rule is, that where the defendant being in possession sets up a title which does not appear to be in bad faith, chancery has no jurisdiction until the dispute of title is settled at law, unless possibly in case of defendant's insolvency. But even in that case, in *North*

¹ Strong, J., in *Munson v. Tryon*, 6 Phila. 399.

Carolina it is held that an injunction should not be granted, but a receiver appointed. The jurisdiction of equity to enjoin the commission of waste is well established. And if, therefore, the act by which the land is robbed of its minerals is not a trespass, but is waste, an injunction will lie.

Rights of water in mining communities are also the subject of especial attention in equity: "There is no species of property," says Justice Field, "requiring more frequently for its protection and enjoyment the aid of a court of equity, and particularly of its preventive process of injunction, than rights to water."¹ Equity, therefore, assumes jurisdiction to prevent the invasion of these rights where the character and extent of the wrongful acts committed render the injury irremediable, or where by reason of defendant's insolvency the remedy at law would be inadequate. To call into action this power of the court, however, the injury must be continuous, or threaten to be so, or be likely to be so.

The foregoing cases have been referred to because chancery in them extends its jurisdiction for the express purpose of protecting property in mines. The remedy by injunction is, of course, applicable to a variety of other questions that may arise in connection with mines and mining, especially in the restraint of nuisances; but there is nothing in the principles enunciated or their application which is peculiar to this kind of property, and their consideration is, therefore, not properly within the province of this work.²

A special jurisdiction has been created by statute in the numerous acts passed for the protection of the health and safety of miners. The statutes usually provide as a cumulative remedy that where an owner or operator of a mine refuses to comply with the requirements of the statute, an injunction may, upon the application of the inspector, issue to restrain the working or operation of the miners until the statutory requirements are complied with.³

¹ *Cole S. M. Co. v. Virginia & Gold Hill W. Co.*, 1 Sawy. 685, *post*, p. 720.

² Instances, however, may be found collected in the cases below.

³ Act of Congress of March 3, 1891, sec. 16, Supp. to Rev. Stats. 949; Colorado, Act April 1, 1889, sec. 10 (M. A. S. 3215); Illinois, Hurd's Rev. Stats. 1895, ch. 93, secs. 13, 18, pp. 1044-5; Iowa, Rev. Code 1888, tit. xi. ch. 8, p. 590, secs. 14, 19;

Kansas, Gen. Stats. 1889, sec. 3856, Montana, Pol. Code 1895, sec. 3356; Pennsylvania, Act May 15, 1893, art. xi., P. L. 71; June 2, 1891, art. xv., P. L. 204; Utah, Act April 5, 1896, ch. 113, sec. 17; Washington, Gen. Stats. 1891, secs. 2230, 2234; West Va., App. to Code 1891, p. 996, par. 12; Wyoming, Laws of 1890-91, ch. 80, sec. 11.

And injunctions have also been provided to enforce the entering of security to protect the owner of the surface;¹ and to preserve the *status quo* pending a survey to determine whether an encroachment is being made upon adjoining land.² As to injunction pending partition proceedings, see Chap. I., Div. IV.

United States. *United States v. Parrott*, 1 McAllister, 271 (1858), C. C. D. Cal. Bill to restrain the working of a quick-silver mine, the title to which defendant derived from a Mexican grant which it was alleged was procured by conspiracy to defraud the plaintiff, and was forged and antedated. The defendants had petitioned the Board of Land Commissioners organized under act of Congress, March 3, 1851, for a confirmation of their claims, and their application was pending on appeal before the District Court. In the meantime defendants were extracting minerals of the annual value of one million dollars.

Held, injunction would lie. The institution of an action at common law is not a prerequisite to this bill. "No case has been cited which has made the omission of a party to have previously instituted a suit at law, the sole ground for refusing an injunction, where fraud was alleged and irreparable mischief the injury sought to be remedied." In any event, the proceeding in the District Court was a sufficient pending litigation to support the bill.

"Another objection to the relief prayed for is that an injunction cannot be granted to enjoin a trespass where the title is disputed.

"In a case of mere trespass, or a technical waste where the mischief is not imminent, where no equitable circumstances appear, and no fraud alleged, and where the title of plaintiff is disputed in the manner prescribed by law, the rule is correctly stated.

"Where the mischief sought to be protected against is irreparable and imminent; where the bill alleges fraud and antedating in the execution of the title-papers set up by the defendants, and their genuineness is affirmed only on information and belief, — the case does not exist, to the knowledge of this court, where the rule contended for is to be literally applied."

French v. Brewer, 3 Wall. Jr. 346 (1861), C. C. W. D. Pa. A preliminary injunction against sinking oil wells at the suit of a tenant against his landlord was refused where it would inflict a certain injury on respondents, while complainant's benefit as well as title was uncertain, and in the event of recovery on final hearing the new wells would be a benefit and not an irreparable damage.

Cole S. M. Co. v. Virginia & Gold Hill W. Co., 1 Sawy. 685 (1871), C. C. D. Nev. "There is no species of property requiring more frequently for its protection and enjoyment the aid of a court of equity, and particularly of its preventive process of injunction, than rights to water. For purposes of mining, as well as for ordinary consumption,

¹ Colorado, M. A. S. 3159; Dakota, 9, 3843-5; Dakota, Comp. L. 1887, ch. Comp. L. 1887, ch. 19, art. i., sec. 2007; 19, art. i., sec. 2015; North Dakota, Rev. Wyoming, Laws 1888, ch. 40, sec. 6. Codes 1895, sec. 1443.

² Kansas, Gen. Stats. 1889, secs. 3835-

water is carried, in the mining regions of Nevada and California, over the hills and along the mountains, for great distances, by means of canals and flumes and aqueducts, constructed with vast labor and enormous expenditures of money. Whole communities depend for the successful prosecution of their mining labors upon the supply thus furnished; and it is not extravagant to say that much of the security and consequent value of this species of property is found in the ready and ample protection which courts of equity afford by their remedial processes of injunctions, anticipating threatened invasions upon the property, restraining the continuance of an invasion when once made, and preserving the property in its condition of usefulness until the conflicting rights of contesting claimants can be considered and determined. The limitation of the process to cases calling for no affirmative action on the party enjoined would strip the process in a multitude of cases of much of its practical benefit." Field, J.

Atchison v. Peterson, 20 Wall. 507 (1874). At the suit of the first appropriator of water of a stream for an injunction against miners to restrain the deposit of refuse and tailings in the stream, an injunction was refused because it appeared that the injury sustained was hardly appreciable in comparison with the damage which would result to the defendants from the suspension of work on their claims, and the defendants were responsible, capable of answering for any damages which they might do to the plaintiff.

"Whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction." Field, J.

Chapman v. Toy Long, 4 Sawy. 28 (1876), C. C. D. Oreg. An injunction was granted at the suit of persons who had located mining land already in the possession and enjoyment of defendants, who were alien Chinese.

"The remedy by injunction was once confined to waste, or cases of trespass between parties who were privies in title, such as landlord and tenant, mortgagor and mortgagee, tenant of the particular estate and remainder-man, and in those cases the complainant was of course not in possession. But the distinction between the trespass technically called waste, and the ordinary trespass between parties who are strangers or claiming adversely to one another, has been gradually disregarded by courts of equity, until it cannot now be said to exist. Wherever a trespass is attended with irreparable mischief, or a multiplicity of suits or vexatious litigation, the remedy by injunction will be applied the same as if it were a technical waste. (Story's Eq. J., secs. 918, 928; Ad. Eq. 109.) An injunction is now allowed in all cases of trespass upon mines, upon the ground that the acts complained of are, or may be, an irreparable damage to this particular species of property. (Id. sec. 918; *Livingston v. Livingston*, 6 Johns. Ch. 499; *Merced Mining Co. v. Fremont*, 7 Cal. 320.) And this doctrine is particularly applicable to

the case of a continued trespass upon a placer gold mine — the value of which consists wholly of auriferous deposits, that may be worked out and removed without leaving any evidence of their quantity or value upon which to base an estimate or account, as in the case of coal, stone, or other minerals not precious. If, then, the complainants, by their location, have acquired a right to possess the premises and appropriate the minerals contained therein, the defendants can have no such right, and the exercise of it by them is an irreparable injury to the interest of the complainants, and the latter are entitled to the injunction asked for." Deady, J.

Erhardt v. Boaro, 113, 537 (1885). Field, J.: "This is a suit in equity, ancillary to the action for the possession of the mining claim just decided (113 U. S. 527). It is brought to restrain the commission of waste by the defendants pending the action. The bill sets forth the discovery by one Thomas Carroll, a citizen of the United States, while searching on behalf of himself and the plaintiff, also a citizen, for valuable deposits of mineral on vacant unoccupied land of the United States, of the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities, the posting by him in his name and that of the plaintiff, at the point of discovery, of a notice that they claimed fifteen hundred feet on the lode, the intrusion of the defendants upon the claim, their ousting the locators, and other facts which are detailed by the record in the case decided, and the commencement of the action at law. It also alleges that the defendants were working the claim, and had extracted from it one hundred and fifty tons, or thereabouts, of ore, containing gold and silver of the value of \$25,000, and that about one hundred tons remain in their possession on the premises. The bill prays for a writ of injunction restraining the defendants from mining on the claim, or extracting ore therefrom, or removing any ore already extracted, until the final determination of the action at law. The principal facts stated in the bill are supported by affidavits of third parties. The court granted a preliminary injunction, but, after the trial of the action at law, judgment being rendered therein in favor of the defendants, it dissolved the injunction and dismissed the bill. From the decree of the court the case is brought here by appeal.

"It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In *Pillsworth v. Hopton*, 6 Vesey, 51, which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench 'that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction.' This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irreparable mischief is being done or threatened, going to the destruction of the substance of the estate, such as to the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised

in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. *Jerome v. Ross*, 7 Johns. Ch. 315, 332; *Le Roy v. Wright*, 4 Sawyer, 530, 535. As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues."

The injunction was accordingly restored.

Montana Co. v. Clark, 42 Fed. 626 (1890), C. C. D. Mont. An injunction will not issue to restrain the mining on the dip of his vein outside of the side lines of defendant's claim, on the ground that he may not so follow his vein, because his claim is so shaped as to be without end lines. He was not a trespasser. But where defendant's workings threatened to destroy plaintiff's tunnel and to enter his lode, an injunction will issue.

Rend v. Venture Oil Co., 48 Fed. 248 (1891), C. C. W. D. Pa. The drilling of an oil or gas well through a part of a coal mine, from which all the coal has been extracted except what is necessary for the props, would not, by its mere physical damage to the mine or its effect as an obstruction, threaten such an injury as would warrant the issuance of a preliminary injunction. Nor will such an injunction issue on the ground of the danger of explosions from escaping gas, when the existence of such danger is denied by affidavits equally entitled to credit as those of the plaintiff.

Coosaw M. Co. v. South Carolina, 144, 550 (1892). Jurisdiction to restrain the defendant from mining phosphates from the bed of a navigable stream at the suit of the State in equity exists upon the grounds upon which chancery courts interfere in cases of waste, public nuisance, and purpresture.

St. Louis M. & M. Co. v. Montana M. Co., 58 Fed. 129 (1893), C. C. D. Mont. When title is in dispute, whether legal or equitable, an interlocutory injunction will be granted, restraining the mining of valuable ores pending its determination.

An injunction will not issue in such a case when neither the bill nor the proofs fix the point where defendants must stop. Hence the court will not, in terms, enjoin them from working any vein in complainant's claim, for this would require the defendants to ascertain from what acts they are enjoined. Nor will the working of disputed veins for purposes of exploration only be enjoined.

Thomas v. Nantahala M. & T. Co., 58 Fed. 485 (1893), C. C. Ap., 4th Circ. On a bill to enjoin a trespass and the taking out of ores, where the ground in dispute is a narrow strip adjoining which both parties have undisputed possession of other ground which they can continue to work, the case is not one for a receiver, but for an injunction to maintain the *status quo* until the title can be determined in a suit at law.

Oolagah Coal Co. v. McCaleb, 68 Fed. 86 (1895), C. C. Ap., 8th Circ. The complainants were the assignees of licenses given by the Cherokee Nation to mine and sell coal on certain land. They alleged that the defendants, claiming under a subsequent license, issued either under a mistake of fact or through fraud on defendants' part, had entered upon the lands, were mining and shipping coal and preventing

plaintiffs from doing so; that such acts tended to destroy complainants' estate, were inflicting irreparable injury, and that defendants were insolvent. This was sufficient to give equity jurisdiction of a bill for an injunction. Even if the bill disclosed a dispute as to title, it would be competent for a court of equity to restrain the commission of trespasses which render the property valueless for mining purposes, until the controversy as to the title is settled by the proper tribunal. "We think, however, that, in so far as the bill shows that the right to mine coal is in dispute, and that the defendants are acting under a claim or color of title, it also shows that that controversy is one which is within the jurisdiction of a court of equity." Such a court may inquire whether the defendants' license was void on the ground of fraud or mistake.

Merced M. Co. v. Fremont, 7, 317 (1857). "This distinction between waste and trespass, so far as regards the power of the court to grant an injunction, has been set aside, and 'it is now granted,' says Mr. Justice Story, 'in all cases of timber, coals, ores, and quarries, when the party is a mere trespasser, or when he exceeds the limited rights with which he is clothed, upon the ground that the acts are, or may be, an irreparable damage to the particular species of property.'" "The ground upon which the injunction was granted in these cases of timber, coals, ores, and quarries, was that the trespasser, in the language of Lord Eldon, was 'taking away the very substance of the estate.' If a party enter upon the premises of another and occupy them for the purpose of husbandry, and cultivate them in a proper manner, so as not materially to diminish the value, when they shall afterward come into the possession of the rightful owner, the courts will not grant an injunction to restrain the party in possession, pending the litigation, for this would be of no benefit to the owner, and might be an injury to both parties. But when the alleged trespasser is taking away that which cannot be replaced, and which constitutes the substance of the mine itself, so as to diminish its value when restored to the owner, it constitutes a very different case."

These principles apply to mining claims, the possessory owners of which may maintain bills for injunction against trespassers who are destroying the substance of the estate.

"It must be conceded that the principles of these cases apply to *gold* mines, as well as to others. In fact there are circumstances connected with gold mines that render the remedy by injunction more appropriate than to other mines. The only value of a gold-mining claim, in most cases, consists in the mineral. For timber, for cultivation, and for other purposes, they are generally valueless. If a party removes the gold, he removes *all* that is of any value in the estate itself. It is emphatically taking away the entire substance of the estate. Another material circumstance is the impossibility of making any certain estimate of the amount of injury done. In the case of a coal mine or stone quarry, the amount removed can be substantially ascertained by admeasurement. So in the case of timber trees, their size, number, and value can be substantially ascertained. But in reference to gold mines this is not the case. There is no mode of estimation that even approaches to substantial accuracy, and hence the greater necessity

for preventing that injury which you cannot estimate, and, therefore, cannot compensate adequately."

Taking away the minerals is in itself an irreparable injury; and the mere statement of this fact is a compliance with the rule that the complaint must state how the injury is irreparable. Insolvency is not a necessary allegation in such a bill, and "the allegation in the complaint that the defendants justified under an adverse claim will not in any sense prejudice the right to the injunction."

Coker v. Simpson, 7, 340 (1857). The diversion of water from a stream to the injury of the prior appropriator will not be enjoined where there is no allegation that the injury was continuing, or threatened to be continued, or likely to be continued.

Henshaw v. Clark and 103 Chinamen, 14, 460 (1859). The owner of land which is invaded by persons setting up a license from the State or general government to mine for gold, on the ground that the gold is the property of the sovereign, may have an injunction to restrain them.

"The injuries which are the subject of complaint are of a character calculated to destroy the entire value of the land for all useful purposes. Those which result from flooding are continuous in their nature, necessarily effecting the exclusion of the owner. Those which consist in excavating ditches and in digging up the soil are irreparable, in the sense that the former condition of the property could not probably be restored without an expenditure exceeding the original value of the land. The defendants, with the exception of one, are Chinamen—with no permanent places of residence, and of little pecuniary responsibility—against whom, when the gold is once extracted, and they have departed from the ground—a claim for redress for injuries committed to the freehold could seldom, if ever, be successfully enforced. A denial of the preventive remedy by injunction in such case would be tantamount to a denial of all protection."

Real Del Monte M. Co. v. Pond M. Co., 23, 83 (1863). An injunction to restrain parties from working a mining claim will not be granted when the defendant's answer denies all the allegations of the complaint, unless the latter is supported by additional affidavits. Such an injunction will issue only when there is urgent necessity, when the application is made promptly, and not delayed until the defendant has made large expenditures; and, as a general rule, only when the plaintiff's title is clear and well established and not in dispute. The solvency of defendant and his ability to respond in damages is an important element in determining whether an injunction should issue.

More v. Massini, 32, 590 (1867). Injunction will lie to restrain a threatened trespass on land where the trespass, if committed, would destroy the substance of the land, which could not be specifically replaced. In this class of cases no allegation of insolvency is necessary, and it is a matter of indifference whether plaintiff is in or out of possession. Under this principle, one who threatens to enter upon lands alleged by the plaintiff to be owned by him, and quarry and remove asphaltum therefrom, will be enjoined.

Heas v. Winder, 34, 270 (1867). When the title to a mining claim is in dispute, an injunction may be granted to preserve the property pending the litigation. A new trial ordered did not entitle defendant to a dissolution or modification of the injunction.

Richards v. Dower, 64, 62 (1883). The owner of land is entitled to an injunction against a stranger who is constructing a tunnel under it for the purpose of mining. The finding that the injury is not irreparable is inconsistent with the findings which describe the character of the work. The permanency of the work is sufficient to entitle plaintiff to an injunction. The injury is irreparable in itself, and the defendant's solvency is an immaterial circumstance.

Eureka Lake & Yuba Canal Co. v. Superior Court, 66, 311 (1885). Sec. 531, Code Civ. Proc., provides that an injunction "to suspend the general and ordinary business of a corporation" cannot be granted without notice. An injunction which suspends the conduct of mining operations in a particular manner by a mining corporation is not within this statute, as, for instance, an injunction restraining such a corporation mining by the hydraulic method, although the business of the corporation had been only to mine by this process.

Same point decided in *Golden Gate M. Co. v. Superior Court*, 65 Cal. 187 (1884).

Champion M. Co. v. Consolidated Wyoming G. M. Co., 75, 78 (1888). An injunction will not issue to restrain one from mining on the claim of another, when he has never done so or threatened to do so.

Hunt v. Steese, 75, 620 (1888). Pending ejectment plaintiff is entitled to an injunction restraining defendant from washing away the soil for mining purposes until the issue of ownership is determined, unless it appears that the plaintiff's title is bad, or at least that there is no reasonable ground for the assertion of title by him.

Derry v. Ross, 5, 295 (1881). It is a common practice for courts of equity to assume jurisdiction to restrain acts of trespass to mining property and water rights where the character and extent of the wrongful acts committed render the injury irreparable, or where an action at law would not afford an adequate remedy, by reason of the insolvency of the defendant.

Fuller v. Swan River M. Co., 12, 12 (1888). Under Gen. Stats. of 1883, sec. 2393, miners must take care of their tailings on their own property. Evidence of a custom to dump their tailings on their own grounds and let them take care of themselves is insufficient to prevent the issuing of an injunction against the washing of tailings upon plaintiff's claim. Nothing but plaintiff's consent will excuse this act. The appropriate remedy for acts which render the development of mining claims impossible is in equity, the legal remedy being inadequate. It is no objection in such an action that the value of plaintiff's claim does not appear, it being impossible to estimate its value until it has been demonstrated by development.

Sprague v. Locke, 28 Pac. 142 (1891). Under Civ. Code, sec. 159, providing for an injunction for the restitution of mining property from which plaintiff has been ousted by fraud, force, violence, or is kept out by threats, etc., a writ will issue when it is shown that while the working of the mine by plaintiff was suspended, and the shaft house fastened, defendant, by force or otherwise, entered the shaft house and maintained possession with fire-arms without regard to plaintiff's title.

Where defendant had been in possession most of the time from 1880 to about November, 1887, and plaintiff took possession about six

months thereafter, and held the same undisturbed for twenty-one months, the absence of the defendant was not such a "temporary absence" as will prevent the issuance of the writ under the statute.

Florida. *Brown v. Solary*, 19 So. Rep. 161 (1896). Chancery has jurisdiction of a bill to quiet title, and enjoin the mining of phosphate rock, where it is alleged that the land is chiefly valuable for this mineral, and that defendants were committing irreparable injury and destroying the value of the land. The question was raised by demurrer, which was overruled. "In cases of serious and irreparable injury going to the destruction of the substance of the estate, the court has for a long time granted injunctions, and in some cases when the title was in litigation, to preserve the property from destruction pending legal proceedings." "Should the bill state possession in defendant under such a claim of title as to show in him *prima facie* right, without sufficient impeachment of it, the complainant would have no status in a court of equity; but should it appear that the defendant had entered upon the land for the purpose of removing the substance of the soil, under a claim wholly void, and this should be admitted upon the record, the court would have jurisdiction." To what extent the court would go when the question was raised by an answer was not presented by the record.

Georgia. *Moore v. Ferrell*, 1, 7 (1846). Where a complainant sets up his title to land, its great value on account of the gold contained in it, the insolvency or inability of respondents to respond in damages for the injury they are doing by digging for ore on the land, and the answer makes no denial of these allegations, except the insolvency, which it unsatisfactorily denies, equity will enjoin the respondents from further digging. "The reasons for giving to the courts of equity in our own State this salutary jurisdiction are conclusive, and apply with equal force nowhere but in countries where mines of the precious metals abound. They are found in the number and value of our gold mines, the facility with which, in a very short space of time, incurable injury may be done to the property, the impossibility in almost every case of demonstrating by proof at law the extent of the damage, and in those temptations which gold alone can afford to the cupidity of the lawless. It is no answer to say that an injunction may work ruin to an honest owner. The withholding it will more frequently work ruin to honest owners. Besides, the defendant is protected by the injunction bond."

Smith v. City Council of Rome, 19, 89 (1855). Defendant, having laid out streets over plaintiff's land, was enjoined from taking stone from the bed of these streets for macadamizing. The city had only the right of way, and to take stone therefrom was waste, for which an injunction would issue almost as a matter of course.

Nethery v. Payne, 71, 375 (1883). Injunction to restrain the digging of ore will not be granted where defendant is in possession under adverse title, and complainant does not make out a clear title in himself.

Georgia Slate Co. v. Davitte, 79, 627 (1887). The bill set up title by deed from defendant, "excepting the right to cultivate the part of said lot now being tilled, which is reserved," and that defendant had taken possession of all the cleared land and refused complainant a right of way from the quarry on the land to a railroad, and prayed

an injunction. The answer alleged mistake of conveyancer, and that defendant's intention had been to convey only that part of the land containing slate. There being no allegation of defendant's insolvency, an injunction was properly refused.

Silva v. Rankin, 80, 79 (1887). Complainants filed a bill to enjoin the defendants from mining and carrying away ore from a certain lot of land, and at the hearing the following facts appeared. The complainants had a title to the mineral estate in the land, and in the title under which the defendants claimed there had been a reservation of the minerals by certain grantors, which had been sold under an execution against them and had passed to the complainants. A subsequent holder of the land had conveyed it to the ancestor of one of the defendants, reserving the minerals, and had afterwards attempted to convey the mineral estate to another, who made conveyance of one-half to another, under whom, and a lease from the first mentioned defendant, the other defendant claimed a right to operate the mines. It was not denied that the defendants were insolvent. *Held*, there was no error in granting the injunction.

Gilpin v. Sierra Nevada Con. M. Co., 2, 662 (1890). **Idaho.** Under Rev. Stats. Idaho, 4288, defining when an injunction may issue, that remedy lies to restrain the continuance of the unlawful removal of ore from plaintiff's mine, whether or not the injury, if consummated, would be irreparable.

Indianapolis N. G. Co. v. Kibbey, 135, 357 (1893). **Indiana.** owner of a tract of eighty acres granted to K.'s assignor twenty feet square of the same "for the purpose and exclusive right of a gas well on said twenty foot square tract," with rights of way over and through the entire tract. The grantor further covenanted "not to drill, or suffer or permit others to drill or put down, any other gas well or wells on any part of said entire eighty acre tract," except a single well for residence purposes for himself or his neighbors.

K. was entitled to an injunction against a stranger who had entered upon the eighty acre tract, and was sinking a gas well. "An action for damages would have been inadequate, since the damage could not be measured. By the terms of the contract, appellee had a right to all the gas under the eighty acre tract that could be obtained by boring within the twenty foot square, save that which might be obtained from one well for the domestic use of the owner and his neighbors. From the nature of the product it is evident that one flowing well would withdraw the gas from a considerable territory, and that other wells could not be sunk within such territory without diminishing the flow to the first well. How much the flow of appellee's well would be diminished, however, could not be determined; the damages could not be measured in money. Neither would ejectment lie as to that part of the eighty acre tract outside the bounds of the twenty foot square; for as to that part of the land appellee has only the right to the gas under the surface which may be drawn to the well sunk within the square."

Lockwood v. Lunsford, 56, 68 (1874). **Missouri.** Where a mere trespasser digs into and works a mine to the injury of the owners, an injunction will be granted, and more particularly so where the trespasser is insolvent, so that an action at law could not avail.

The facts of the case show that the defendant, a licensee whose license had been revoked, was engaged in unlawfully, against the will of plaintiffs, extracting and removing ore from a valuable mine belonging to them; that the land was valuable only for the minerals that were being removed; that defendant threatened to continue his work of extracting the mineral from the land, to the great damage and destruction thereof; that defendant was wholly insolvent, so that a judgment at law would be unavailing. A perpetual injunction was granted after trial.

Heaney v. Butte & Mont. Com. Co., 10, 590 (1891).

Montana. An injunction will not issue to restrain a trespasser from removing trees from a limestone mining claim, upon the owner's averments that he intends to work it, and that the trees are necessary for fuel, which is scarce and difficult to obtain by reason of remoteness from a railroad, when it is not shown that the trespasser is insolvent and unable to respond in damages. There is an adequate remedy at law, and the injury is not irremediable. The removal of the timber will not destroy or injure the estate in the character in which it is enjoyed, but will only increase the cost of fuel.

Thorne v. Sweeney, 12, 251 (1877). "The foundation of the jurisdiction in a court of equity to issue an injunction, in aid of the action of trespass, is the probability of irreparable injury, the inadequacy of pecuniary compensation, or the prevention of a multiplicity of suits where the rights are controverted by numerous persons. . . . It is not sufficient that the complaint alleges that the injury would be irreparable. The plaintiff must affirmatively show how and why it would be so, otherwise the extraordinary remedy by injunction ought not to be allowed. . . . The construction of a ditch across the rocky, barren, and uncultivated land of plaintiff is not an irreparable injury."

Ackerman v. Hartley, 4 Halstead's Ch. 476 (1850).

New Jersey. The lessee of the right to quarry on two adjoining lots, quarried on but one; the lease expired, and without renewing it he continued to quarry on the one lot, paying therefor a reduced rent.

Held, he had no right then to quarry on the other lot, and having done so, he was enjoined and an account decreed.

Lord v. Carbon Iron Mfg. Co., 38 Eq. 452 (1884). One mine owner will not be enjoined from permitting water to flow from his mine into that of his neighbor through apertures made by his predecessor in title. "The defendants cannot prevent the water from flowing through the two apertures except by building bulkheads or some other barrier, or by pumping. The injunction, to accomplish its purpose, must command or coerce the defendants to do certain affirmative acts, not merely to remain inactive or refrain. Injunctions of this nature are rarely granted before final hearing, or before the parties have had a full opportunity to present all the facts of the case in such manner as will enable the court to see and judge what the truth is. They are always granted cautiously, and are strictly confined to cases where the remedy at law is plainly inadequate. In the present condition of the case, it is impossible to say that the complainants' injuries, resulting from the flow of the water through these apertures, will be of such character as to entitle them to relief in this form."

Lord v. Carbon Iron Mfg. Co., 42 Eq. 157 (1886). If an upper mine owner break through a barrier which was left by a lower adjacent owner to protect his mine from water, the upper owner is liable for the trespass, but he cannot be compelled in equity either to close the opening or prevent the flow of water into it. "For a simple trespass which, as a legal wrong, is complete when the force by which it is committed ceases, and which is continuous in nothing but the consequences which may flow from it subsequent to its commission, the only remedy known to the law is an action of trespass, in which the person injured must recover his damages once for all. . . . Courts of equity in cases of trespass exercise a limited and not a general jurisdiction. They may prevent or stop a trespass, but they cannot otherwise redress wrong of that kind. They may restrain a threatened trespass, if the injury likely to ensue will be irreparable, or they may enjoin the continuance or repetition of a trespass; but for a completed trespass which is finished and ended when protection is sought they can give no redress whatever."

Jerome v. Ross, 7 Johns. Ch. 315 (1823). A trespass **New York.** will be enjoined when it is causing great and irreparable mischief, which damages could not compensate, because the mischief reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed. "I do not know a case in which an injunction has been granted to restrain a trespasser, *merely because he was a trespasser*, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass."

The bill in this case was insufficient to warrant an injunction. "The bill contains a charge of trespass, by entering upon the land of plaintiff, and digging, throwing up, and carrying away large parcels of stone from a ledge of stone and mass of rock on the premises. Several actions have been commenced in a court of record to recover damages for this trespass; but it is not stated that any of these actions have been brought to trial. One action has likewise been instituted before a justice of the peace, and that action has been tried, and the plaintiff recovered damages to the amount of 25 dollars. The plaintiff has his complete and perfect remedy at law for the trespass, as often as it may be repeated; and the only question is, whether the injury be so ruinous and irreparable as to call for the extraordinary interposition of a court of equity. The bill does not pretend that the ledge of rock upon which the trespass was committed, was of any particular use or value to the plaintiff, or that he ever did or ever intended to apply it to any valuable purpose. The plaintiff speaks of the injury as irreparable because the loads of stone taken from the mass of rock cannot be replaced or restored; but as he does not state that the rock was of any use to him, as proper or fit for building, fencing, etc., or that it was even desirable as an object of ornament or taste, there was no need of having the same identical fragments of stone replaced, and the injury was not, in the sense of the law, irreparable. It was susceptible of a perfect pecuniary compensation." It is not the case of a lead or coal mine, or a quarry of marble or a fine building, etc., which the Court of Chancery has thought proper to protect from trespass and ruin by the strong and menacing hand of an injunction.

West Point Iron Co. v. Reymert, 45, 703 (1871). "Mines and quarries are protected by injunction upon the ground that injuries to and depredations upon them are, or may cause, irreparable damages, and also with a view to prevent a multiplicity of actions for damages that might accrue from a continuous violation of the rights of the owners." The plaintiff's title in this case was clearly and abundantly established. "That set up by the defendants was sham." It was held to be a proper case for relief by injunction, without plaintiff's first establishing his right to the mine by an action at law.

Allegheny Oil Co. v. Bradford Oil Co., 21 Hun, 26 (1880), affirmed 86, 638. This was an action in equity, in the nature of a bill *quia timet*, to remove the cloud upon the title caused by another's entering upon the land and claiming the right to bore a well. Although as a general rule it is true that an action cannot be maintained by a plaintiff to remove, as a cloud upon his title, conveyances or liens or incumbrances which appear to be void upon their face, yet the authorities show a different rule prevails when the subject of the controversy is mines or mining property.

Falls v. McAfee, 2 Ired. Law, 236 (1842). "The case arose early after the business of mining began, and the writ [of injunction] was improvidently awarded, without recollecting at the time that to stop the working of the mine was alike opposed by the public policy and the private justice due to the party that might be found ultimately to be the owner; and that it would be rather promote all interests to appoint a receiver, or take some other method for having the profits fully accounted for." Quoted with approval in *Deep River G. M. Co. v. Fox*, 4 Ired. Eq. 61 (1845).

Irwin v. Davidson, 3 Ired. Eq. 311 (1844). As a general rule, equity takes no jurisdiction in cases of trespass. But there is an established exception in the case of mines, timber, and the like, when the trespass consists of acts by which the substance of the estate is destroyed or carried off, when injunctions will be granted to restrain the continued commission of the trespass upon the ground that it is an injury of the nature of destructive waste, and of irremediable mischief to the substance of the inheritance. But before equity will assume this jurisdiction the complainant must have established his title at law.

Parker v. Parker, 82, 165 (1880). Pending an action to recover land upon which is a mine, an injunction will not be granted to stop the working of the mine; but where it appears that the party in possession is of doubtful ability to respond in damages, if he be unsuccessful in the action, a receiver will be appointed to secure the profits.

Allen v. Dunlap, 24, 229 (1853). To the general rule **Oregon.** that equity will not grant an injunction in cases of mere trespass, "there is an established exception in cases of mines, timber, and the like, in which an injunction will be granted to restrain the commission of acts by which the substance is injured, destroyed, or carried away." In such case, the injury being irreparable or difficult of ascertainment in damages, the remedy at law is inadequate." Such a suit in equity may be maintained by one in possession of a mining claim, claiming title by location, without first establishing his title at law. The plaintiff being in possession cannot resort to an action at law to

establish his title. It is the defendants who are in a position to bring such an action, if they wish to determine that question at law.

Mammoth Vein Con. Coal Co.'s Ap., 54, 183 (1867).
Pennsylvania.

Where there is a dispute as to their rights between parties claiming under different leases of the same coal veins, or different parts of the same veins, an injunction cannot be granted at the suit of one until these rights are settled at law or in equity. A preliminary injunction is a preventive remedy to avoid injurious consequences that cannot be repaired, and to compel the defendant party to maintain his status until the matters in dispute be settled by due process of the courts; "the sole foundation for such an order being, in addition to cases of unquestioned rights, the prevention of irreparable mischief or injury."

Munson v. Tryon, 6 Phila. 395 (1867), Supreme Ct. at *Nisi Prius*. "There has been an increasing tendency in courts of equity for many years to disregard the technical distinction between waste and trespasses in the nature of waste, and to interpose by injunction against the latter, as well as the former, whenever such interference is necessary to prevent permanent injury."

"A defendant does not of course paralyze the arm of a chancellor when he asserts that the acts complained of as done by him, are under a claim of right or title in himself. If he is out of possession he may be enjoined, though he claims adversely to the plaintiff. Let it be that the circumstances must be peculiar. The right to judge of those circumstances, and to interfere if necessary for the preservation of the property is in courts of equity. What the peculiar circumstances must be, it is of course impossible to define. They will differ in each case. Doubt in the mind of the judge whether a defendant is not transgressing the right claimed by him, seems to be one. Attempting collusions with the tenants of the plaintiff is another. Inability on the part of the plaintiff to resort to law is another. Whatever will satisfy a court that the threatened mischief ought to be prevented until the title be ascertained, warrants interference to prevent destruction of the subject of dispute until the controversy be determined." Strong, J.

Plaintiffs had entered upon the land in question under claim of title in 1853, and had had actual possession by tenants to 1865, during which time they had improved the premises. In 1863 one of the defendants bought an outstanding title which had not been asserted from 1797, for an inconsiderable sum, and leased to other of defendants, who, in 1865, began to survey the land, and threatened to sink shafts, and mine and take away coal. In view of the delay in asserting this title, and the want of confidence in it shown by those who put it forth, "those who claim under it ought not, in my judgment, to be permitted to do acts upon the property which the law recognizes as waste or injury to the inheritance, until they have maintained their right at law." They were in a position to test the title by an action of ejectment, which plaintiffs could not do, except by confessing themselves out of possession; and there was evidence of attempted tampering with plaintiffs' tenants, and fraudulent use of criminal process against them. An injunction was accordingly granted to continue until defendants should maintain their alleged rights to the property by an action at law.

Allison's Ap., 77, 221 (1874). The owner of an oil leasehold is entitled to an injunction to restrain a trespass which is of a permanent nature, and is destructive of the leasehold. Sinking a well by an adjoining lessee upon land adjoining the border of the land of the leasehold, which belonged to same lessor, and was part of a "protection" provided for in the lease, is such a trespass. "It is clear, then, that under the equitable powers conferred by the statute, the court below had jurisdiction for its prevention or restraint."

Grubb's Ap., 90, 228 (1879). Alfred B. Grubb, having acquired title to the whole of Mt. Hope Furnace, claimed the right to take from the Cornwall banks, under his deed from Clement, a full supply of ore for the furnace. Clement, contending that he was only entitled to a half supply, brought a bill in equity. The court dismissed the bill for want of jurisdiction. "No question of waste is raised by this record. Waste is spoil or destruction done or allowed to be done to houses, woods, lands or other corporeal hereditaments by the tenant thereof, to the prejudice of the heir, or of those in reversion or remainder. By the act of 27th of March, 1833, Pamph. L. 99, the provisions of the second section of the act of 2d April, 1803, restraining waste, are extended to quarrying and mining. But it has never been held that a person who is not a tenant in possession, but possessing a right to dig ores, is guilty of committing waste when he takes out more ore than his contract or his rights call for. Nor does the case come within the rule of repeated trespasses for the reason that the appellant is not a trespasser. His right to dig ore at the Cornwall banks is not disputed. The question whether he has a right to a whole supply for his furnace or only a half is another matter, and has no bearing upon the question of trespass."

Leininger's Ap., 106, 398 (1884). The principle stated in *Munson v. Tryon* approved. "Here the defendants claim title to a tract of land long ago warranted and surveyed and the lines marked. It is entirely outside the actual occupancy of the plaintiff, but not of its possession, before the entry by defendants. The plaintiff, with knowledge that the defendants had taken possession and were preparing to mine coal, did not invoke injunction for nearly two months, nor until after the mining had been begun. There was no imminent peril requiring a speedier remedy than given at law. The evidence fails to show danger of irreparable injury, unless relief be granted in equity; nor did the master find any unusual or peculiar circumstances to distinguish this case from an ordinary taking possession of unimproved land under a good faith assertion of title, when the possession had previously been in an adverse claimant. It does not appear that the defendants' claim of title is in bad faith—the nature and limited extent of the improvement indicate the open assertion of their right rather than an attempt to carry away the body of coal under a false claim. If the defendants' title is good their entry was lawful, and they had the right to continue in possession. What they did and were doing, if the real owners, was the legitimate exercise of their right, and we discover nothing peculiar in the case to justify an injunction the effect of which was to turn them out."

Westmoreland N. Gas Co. v. De Witt, 130, 235 (1889). Injunc-

tion issued at the suit of the lessee of land for the purpose of drilling and operating gas wells against another to whom the lessor, alleging a forfeiture, had leased the land, and who was threatening to sink a well. "The bill is a bill to stay waste, and that the damage threatened, even if not irreparable, is entirely incapable of measurement at law, cannot be seriously questioned. Such cases were among the earliest and have always been among the most incontestable within the chancellor's jurisdiction." Mitchell, J.

Thomas v. Hukill, 131, 298 (1890). Where a bill in equity was filed by a second lessee of oil lands out of possession, alleging a forfeiture incurred by a prior lessee in possession for failure to perform his covenants, praying for an injunction to restrain further operations, for a decree declaring the prior lease void, and for an account, it was not error to dismiss the bill, the plaintiff having an adequate remedy at law.

Hoch v. Bass, 133, 328 (1890). Lease of ochre mine by which lessee covenanted to mine a certain quantity and pay a certain royalty on a minimum quantity, and that "if any of the covenants above mentioned should not be complied with for the term of three months, then the above lease to be null and void." The lessee being in possession after failure to pay royalty, the lessor could not maintain a bill in equity for an injunction to enforce a forfeiture. There was an adequate remedy at law by assumpsit for arrears, or ejectment for the land.

Duncan v. Hollidaysburg & Gap Iron Works, 136, 478 (1890). Where a bill in equity to enjoin defendants from mining, and for an account, discloses that the controlling question is the defendants' title, which depends upon the construction of a will of a former owner under whom both parties claim, the bill will be dismissed for want of jurisdiction. The title must first be settled in an action at law.

Duffield v. Hue, 136, 602 (1890). A lease for oil purposes described a certain tract of land as demised and leased, "containing an area of ——— according to a division into number sites . . . with the sole right of digging and boring for oil." Held (1) that while the lease in some sense may be said to cover the entire lot for oil-mining purposes, that the operations were restricted to the sites mentioned, and that the lessee had no right of possession for any purpose at any other place within the bounds of the territory demised; (2) that though thus limited in his actual operations, the lessee had the protection of the entire premises. In a bill filed by an assignee of the lessee against a successor in title to the lessor, to restrain the mining of oil on part of the demised premises: held (1) that ejectment would not lie; (2) that the injury threatened being permanent and destructive of complainant's rights under the lease, and the anticipated damages incapable of measurement at law, he was entitled to relief in equity.

Citizens' Natural Gas Co. v. Shenango Natural Gas Co., 7 C. C. R. 277 (1889), affirmed in s. c. 138, 22 (1890). Under jurisdiction of chancery to compel specific performance of an executory contract to sell real estate, and by injunction to keep the property *in statu quo*, the vendor of gas leaseholds and pipe lines who retained title and possession until the payment of the consideration by the vendee, who was given a license to take gas from the wells, will be enjoined from in-

terfering with the flow of gas, upon an attempted revocation of the license.

An injunction will be granted to prevent illegal interference with flowing gas wells used to supply the public.

Acheson v. Stevenson, 130, 633 (1890). Plaintiff conveyed to defendant a town lot, with the restriction in the *habendum* that it was not intended to convey the right to drill for petroleum. On application for an injunction to restrain defendant from drilling an oil well, it appeared that plaintiff had sunk wells near the lot, and in view of this fact defendant might suffer irreparable injury, because there was no means of telling how much of his oil had been taken out through plaintiff's well, and plaintiff's injury would not be irreparable, for the oil mined by him would be drawn off into a pipe line, and its amount, accurately ascertained, would furnish an exact measure of damages. Therefore a preliminary injunction was refused.

Acheson v. Stevenson, 146, 228 (1892). On final hearing, it having been found as facts that the title to the oil was not in plaintiff, and that the purpose of the above provision was not to protect his unsold lands from being drained by oil operations on the lot conveyed, it was held that plaintiff was entitled to an injunction restraining defendant from conducting operations for oil on the lot conveyed, as violating the restrictive covenant, and rendering the neighborhood less desirable for residences; but he was not entitled to an account for damages measured by the amount of oil obtained by the defendant in his operations.

Poterie Gas Co. v. Poterie, 153, 10 (1893). Where a lessor in a mining lease has re-entered in assertion of a claim that the lessee has forfeited his rights and the claim is disputed on every ground, a preliminary injunction will be awarded and continued to restrain the lessor from continued interference with the premises.

Poterie v. Poterie Gas Co., 153, 13 (1893). And under such circumstances a preliminary injunction will not be awarded against the lessee to restrain him from entering upon the premises.

Poterie Gas Co. v. Poterie, 179, 68 (1897). It having been found on final hearing that the lessee was not in default or subject to forfeiture, the injunction against the lessor was made perpetual.

Jennings v. Beale, 158, 283 (1893). Where a bill in equity alleges the exclusive right in plaintiffs to mine coal in certain lands, and avers that defendant is taking it out and shipping it by the carload in such quantities that he will soon exhaust the mines, the court may restrain by injunction the continuous trespass alleged.

Booher v. Browning, 169, 18 (1895). Under a grant of the right to search, dig, and carry away minerals, and a grant of a right of way, defendants built on plaintiff's land a narrow gauge railroad. The defendants denied that they had trespassed, but claimed a right to build a road under their grant. Whether or not they had such a right depended upon the construction of the grant, and until that was determined at law a bill for injunction would not lie.

Utah. *Leitham v. Cusick*, 1, 242 (1875). In an application for an injunction to restrain defendants from working certain mining ground and from selling ores therefrom, the plaintiffs alleged that the injury was irreparable from the fact that it was impossible for them

to know the amount and value of the ores taken from the mine by the defendant. This is insufficient to justify the granting of an injunction. "The facts should be stated from which the court could learn that the taking and selling the ores would be such injury. It is not alleged that the removal or sales were clandestine, or that the respondents are insolvent or otherwise unable to respond in damages, or any other facts going to show the nature of the damages."

Smith v. Richardson, 1, 245 (1875). Pending an action to determine title to mining property, plaintiff applied for an injunction to restrain defendant from committing waste and extracting ores. Defendants answered, denying waste and plaintiff's title, and asked for an injunction against plaintiff, which was granted. This is in accordance with Utah practice.

Old Telegraph Min. Co. v. Central Smelting Co., 1, 331 (1876). Injunction to restrain threatened trespass upon a mining claim was refused, where the title was doubtful and disputed, no steps had been taken to establish the title, and no reason appeared why this had not been done, defendants and plaintiffs being alike in possession.

Kahn v. Old Telegraph Min. Co., 2, 13 (1877). Application for injunction to restrain defendant from mining pending litigation of title. "The title to the property is seriously and apparently *bona fide* in dispute. The defendant is in such possession under such claim of title. It does not appear that the defendant is insolvent, or pecuniarily unable to respond to any damages the plaintiff may sustain. Nor does it appear but that defendant would, by being enjoined, sustain as great or greater injury as the plaintiff can sustain by the refusal of the writ. Under these circumstances we think the court did right in refusing the injunction."

Relief by injunction can, with propriety, be invoked more frequently in reference to mining claims than any other rights in or to real estate, owing to the peculiar character or nature of the property in question.

Smith v. Pettingill, 15, 82 (1849). "Injunctions to **Vermont.** restrain or prevent trespasses have been granted only when the impending injury was to timber, ore, monuments, ornamental trees, coals, and quarries. 2 Story's Equity Jurisp. 207-8-9, and cases there cited. In most of these cases the recovery of damages merely would be an insignificant or very inadequate remedy. The doctrine in regard to this subject is elaborately discussed and placed upon its true ground in the case of *Jerome v. Ross*, 7 Johns. Ch. R. 315."

Anderson v. Harvey's Heirs, 10 Grat. 386 (1853). Where **Virginia.** one enters upon the land of another and mines ore, the land being of little or no value except for the ore, equity will enjoin him, though the owner has his remedy in trespass at law.

"The trespass is one which goes to the change of the very substance of the inheritance, to the destruction of all that gives value to it. The fact proved by the appellant, that the value of the ore per load could be readily estimated, does not deprive a court of equity of its right to interfere in the case by way of injunction. The same might be shown in most cases of the kind. The products of most mines have a value already fixed or easy of ascertainment by proof; yet it was in prevention of like trespasses to this very species of property, mines of ore,

coal, etc., that the jurisdiction in question had its origin, and still continues to be most frequently exercised."

Wisconsin. *Bracken v. Preston*, 1 Pinney, 584 (1845). Trespass in digging or mining on the land of another is within the cognizance of a court of equity, when committed by a mere wrong-doer, or where a party exceeds the limited rights with which he is clothed. It is otherwise, where the title is in dispute. Where a bill was brought in a case of continuing trespass, showing that the complainants were dispossessed, for an injunction pending an action for forcible entry and detainer, and for an account of mineral dug on the premises, and a decree that the defendants surrender possession, and that the complainants might be quieted in their title; and it appeared that the defendants were in possession, claiming a right thereto and working the mine thereon: *held*, that complainants were not entitled to equitable relief; ejectment was the proper remedy, with a preliminary injunction on a proper bill showing the pendency of the action at law, and after a recovery therein the plaintiffs could obtain satisfaction by an action for mesne profits.

Clegg v. Jones, 43, 482 (1878). One who claims an exclusive right to mine on a tract of land, by virtue of an alleged parol lease, and seeks a perpetual injunction restraining others from mining thereon, must establish such right by clear, definite, and unequivocal evidence, satisfactory to the court.

III. RECEIVERS.

As the use of mining property involves the destruction of the very substance of the estate, courts of equity are more disposed, when such property or the title thereto is in litigation, to put it in the hands of a receiver, than they are in similar cases when the property is not mineral. The subject is considered in much the same way as when an injunction against mining is sought.¹ Indeed, in North Carolina, as has been stated, the appointment of a receiver is the only remedy of a claimant out of possession when the title is in dispute and the one in possession is insolvent.

California. *Hill v. Taylor*, 22, 191 (1863). The purchaser at a judicial sale of a mining claim, where the judgment debtor remains in possession, working the claim, and is insolvent, may have a receiver appointed, under the provisions of the Practice Act of 1861, to take charge of the same during the period allowed by statute for redemption, upon showing that the claim will be exhausted during that period. The working of mines is something more than the ordinary use of real estate by one in possession, and requires the use of more than ordinary remedies to protect the rights of the purchaser at a judicial sale.

¹ Wisconsin, Ann. Stats., sec. 1648, p. 988.

Goodale v. Fifteenth Dist. Ct., 56, 26 (1880). Morrison, C. J.: "The foregoing cases show that it is competent for a court of equity, in some cases, to grant a receiver in partition suits, and we can readily understand why such a power should be vested in the court. Take for example the case of a mine containing precious metals. It is in the possession of one tenant in common, and is being worked by him to the exclusion of the other co-tenants. He is insolvent, and unable to respond in damages. Here we have a case in which the value of the property is being rapidly exhausted by an irresponsible co-tenant, and the co-tenants out of possession are threatened with an entire destruction of their estate. Would it not be eminently just and proper for the court in which a suit is pending for the partition of such property, to wrest it from the possession of the tenant holding and working it, and put it into the hands of a receiver?" The case in hand involved no question of mines.

Indiana. *Galloway v. Campbell*, 142, 324 (1895). The appointment of a receiver to operate oil wells, pending an action for specific performance of a contract to assign a lease thereof, is authorized, where the defendant is a non-resident, without property in the State except the machinery on the land, and is operating the wells and selling the product.

North Carolina. *Falls v. McAfee*, 2 Ired. Law, 236 (1842). "The case arose early after the business of mining began. and the writ [of injunction] was improvidently awarded, without recollecting at the time that to stop the working of the mine was alike opposed by the public policy and the private justice due to the party that might be found ultimately to be the owner; and that it would be rather promote all interests to appoint a receiver, or take some other method for having the profits fully accounted for."

Carter v. Hoke, 64, 348 (1870). In an action involving title to mining property, the court refused to appoint a receiver unless the parties in possession were insolvent or were injuring the property by their management.

Parker v. Parker, 82, 165 (1880). Pending an action to recover land upon which is a mine, an injunction will not be granted to stop the working of the mine; but where it appears that the party in possession is of doubtful ability to respond in damages if he be unsuccessful in the action, a receiver will be appointed to secure the profits.¹

Pennsylvania. *Chicago & Allegheny O. & M. Co. v. U. S. Petroleum Co.*, 57, 83 (1868). The lessor, who by the terms of the agreement was entitled to one-fourth of the product of operations of his tenant under an oil lease, filed a bill alleging a forfeiture of the lease, that he had begun an action of ejectment to enforce the same, and praying for an injunction and receiver pending the action. This was refused.

¹ "The practice of the North Carolina courts in not stopping the operations of an established and working gold mine pending litigation as to the title of the land, when the rights of the parties could be better preserved by a receiver, is conformable to the principles of equity as everywhere administered." Morris, D.J., in *Thomas v. Nantahala M. & T. Co.*, 58 Fed. 485 (1893); see page 723, "Injunctions."

"No receiver is asked for the landlord's portion, and plainly because as to it the purpose is to require delivery without interruption. The actual purpose is to take into custody that which will be mesne profits in the event of establishing the forfeiture. Look at the case in any direction, and all that is in it is to obtain our assistance in giving effect to an alleged forfeiture, and to restrain the defendants from the exercise of their legal rights under the lease, while the plaintiffs are engaged in experimenting at law for the forfeiture. It is not for the protection of a clear and well-defined right, and to prevent an irremediable injury which may ensue if we do not intervene, nor is it the ordinary case of one who shows an equitable right in the subject of custody, and asks the court to interfere for its security until the termination of litigation."

Enterprise Co.'s Ap., 9 W. N. C. 225 (1880). A court of equity has no jurisdiction to appoint a receiver to take charge of oil-producing wells, pending an ejectment. In this regard there is no distinction between an oil well and a farm.

Emerson's Ap., 95, 258 (1880). A court of equity has no jurisdiction to appoint a receiver to take charge of an oil-producing well, pending an ejectment brought to try the title to the possession of the premises.

Williamson v. Jones, 39, 231 (1894). See this **West Virginia** case on page 29, *ante*.

IV. INSPECTION

Mining being carried on generally beneath the surface and out of sight of adjoining owners, trespasses upon their property without their knowledge are easy and frequent. Where, therefore, inspection for the purpose of ascertaining whether a trespass has occurred is denied by the mine owner, a court of equity will grant an order for inspection, if reasonable grounds of suspicion appear. This power of the court is of chief value as an aid to the plaintiff in cases of trespass, but in any mining case where the court has been convinced of the importance thereof for the purposes of the trial, it will compel an inspection and survey.

The decree may be to compel the defendant to allow an inspection and survey by the plaintiff, or it may direct an inspection and survey by viewers of the court's choosing. The court may, in making such an order, direct the method in which it may be made, and compel the use of the appliances in use at the mine. The court, however, must be satisfied that the application is made in good faith, and due regard will be paid to the convenience of the defendant.

In many States this right is further secured and defined by

statutes, and this is a constitutional exercise of legislative power.¹

United States. *Thornburgh v. Savage Min. Co.*, 1 Pac. Law Mag. 267 (1867), C. C. D. Nev. In an action for injunction to restrain the defendant from mining upon a certain lode, the question involved was averred to be whether the property described was a separate and distinct lode from a lode which was acknowledged to be the property of defendant. Upon the application of the plaintiff a survey and inspection were ordered.

"Ought a court of equity, in a mining case, when it has been convinced of the importance thereof, for the purposes of the trial, to compel an inspection and survey of the works of the parties, and admittance thereto by means of the appliances in use at the mine? All the analogies of equity jurisprudence favor the affirmative of this proposition. The very great powers with which a court of chancery is clothed were given it to enable it to carry out the administration of nicer and more perfect justice than is attainable in a court of law.

"That a court of equity having jurisdiction of the subject matter of the action, has the power to enforce an order of this kind will not be denied. And the propriety of exercising that power would seem to be clear indeed, in a case where, without it, the trial would be a silly farce. Take as an illustration the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered, except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice and utterly subversive of the objects for which courts were created for them to refuse to exert their power for the elucidation of the very truth — the issue between the parties. Can a court justly decide a cause without knowing the facts? and can it refuse to learn these facts? But one adjudication of this subject can be found in the books, and this is in conformity with the views here expressed, viz., Bainbridge on Mines.

"Of course, before granting an order of this kind the court must be satisfied that the application is made in good faith, and in granting it will pay due regard to the convenience of the party affected." Baldwin, J.

Montana Co. v. St. Louis M. & M. Co., 152, 160 (1894), affirming *St. Louis M. & M. Co. v. Montana Co., Ltd.*, 9 Mont. 288, *post*. Sec. 376, Code of Civil Procedure of Montana, is not in conflict with the provision of the Fourteenth Amendment to the Constitution of the United States, which prohibits any State from depriving any person of life, liberty,

¹ Alabama, Act Feb. 8, 1893, Sess. Laws, 331; Arizona, Rev. Stats. 1887, sec. 2356; Colorado, M. A. S. 3164, 3176; Code, 364; Dakota, Comp. L. 1887, ch. 19, art. 1, secs. 2014-15; Idaho, Rev. Stats. 1887, sec. 4542; Illinois, Hurd's Rev. Stats. 1895, ch. 94, secs. 2-5, p. 1052; Iowa, Rev. Code 1888, tit. x. ch. 2, p. 421, secs. 1230-32; Kansas, Gen. Stats. 1889, secs. 3835-39, 3843-45; Michigan, How. Ann. Stats., secs. 4122-26; Missouri, Gen. Stats. 1889, secs. 7040-42; Nevada, Gen. Stats. 1885, sec. 246; New Mexico, Act Feb. 11, 1887, p. 206; North Dakota, Rev. Codes, 1895, secs. 1442-3; Ohio, Rev. Stats. 1890, secs. 303, 4374-79; Virginia, Code 1887, secs. 2570-72.

or property without due process of law. Brewer, J.: "In conclusion, it may be observed that courts of equity have, in the exercise of their inherent powers, been in the habit of ordering inspections of property, as of requiring the production of books and papers; that this power on the part of such courts has never been denied, and if it exists, *a fortiori*, the State has power to provide a statutory proceeding to accomplish the same result; that the proceeding provided by this statute requires notice to the defendant, a hearing and an adjudication before the court or judge; that it permits no removal or appropriation of any property, nor any permanent dispossession of its use, but is limited to such temporary and partial occupation as is necessary for a mere inspection; that there is a necessity for such proceeding in order that justice may be exactly administered; that this statute provides all reasonable protection to the party against whom the inspection is ordered; that the failure to require a bond, or to provide an appeal, or to have the question of title settled before a jury, is not the omission of matters essential to due process of law."

Dakota. *Duggan v. Davey*, 26 N. W. Rep. 887 (1886). In an action in equity to restrain defendants from prosecuting certain mining operations, they rested their right upon the existence in the ground in controversy of a vein having its apex in another claim belonging to them. *Held*, the court had power to make an order permitting the plaintiff, after the close of defendant's case, to make an inspection and survey of the mine, and of the drifts and tunnels extending from it to the ground in controversy.

The statute giving a method of obtaining a survey in common law actions did not abridge the chancery power of the court, or restrict it to the method prescribed in the statute.

Kansas. *In re Carr*, 85 Pac. 818 (1894). Chap. 127, Laws of 1877, does not authorize a survey by order of a district court of that part of a mine which is located beyond the State line, in the State of Missouri, even though the only means of access thereto is a deep shaft located in Kansas.

Massachusetts. *Stockbridge Iron Co. v. Cone Iron Works*, 102, 80 (1869). Action of tort praying for relief in equity for injury to plaintiffs' land by digging and excavating openings into and under it, and taking mineral therefrom. The plaintiffs alleging that defendants concealed the injury, and prevented them from entering the shaft to ascertain its amount, asked, among other things, that they, by their agents, or proper officers of the court, might have free access into the said shaft, and any drifts and excavations accessible therefrom, in order to make a full survey of all the excavations into the plaintiffs' land complained of, and might be authorized to make all such surveys, exploration, and discovery, and do all such acts as in the premises were rightful and proper to be made or done. The court accordingly appointed viewers, empowering them, after hearing the parties, to appoint engineers, and direct the engineers and workmen employed by them to enter the shaft on the defendants' land, clear the water from the said shaft by pumping or otherwise, examine all excavations and drifts leading therefrom toward and under plaintiffs' land, and clear the same as far as necessary to ascertain what mineral had been taken from plain-

tiffs' land, and to do all acts that might be reasonably necessary to be done to effect the purpose of the decree. The viewers actually obtained access to the drifts by a new excavation made from a shaft of the plaintiffs on the plaintiffs' ground. *Held*, that if this were the cheaper mode of access, and reasonably necessary, it was within the terms of the order, and the expenses of the view, — \$4,841.07, — which had been advanced by plaintiffs, were allowed with interest, such sum including an allowance for the use of plaintiffs' shaft and machinery in making the excavation. "Courts of law have power to allow the reasonable expenses of surveys and views in proper cases, and the fee bill does not apply to the expense of such proceedings. Mines are so situated that special and peculiar proceedings are sometimes necessary in order to attain the reasonable ends of justice in regard to the underground passages by which access to them may be obtained by trespassers."

Montana. *St. Louis M. & M. Co. v. Montana Co., Ltd.*, 9, 288 (1890), affirmed in *Montana Co. v. St. Louis Co.*, 152 U. S. 160, *ante*. Code Civ. Proc. 376 is not unconstitutional as being unjust and oppressive.

Blake, C. J. : "The source [of the statute] is unquestionably found in the chancery practice of England. . . .

"In this State the legislative department has endowed the chancery practice involved in this hearing with the form of law. We are not called upon to decide that the District Courts of the State may make the order complained of, in the absence of any requirement of the Code of Civil Procedure. We can vindicate with absolute certainty the existence of the right to make an order for the inspection and survey of a lode mining claim, where the appropriate steps have been taken by interested parties. . . . There is not an assertion or suggestion by any jurist that rights of property are impaired or transgressed by the making of the orders for an inspection and survey."

The order may be issued without requiring bond and before suit.

Blue Bird M. Co. v. Murray, 9, 468 (1890). Plaintiff, in following its vein on the dip and beyond the side lines of its claim, worked within the limits of defendant's claim. An injunction had been granted restraining defendant from working upon plaintiff's mining claim, and afterwards, on defendant's motion, an order was made, permitting him to prosecute certain specified work within his own boundaries, under certain restrictions and the control of the court, for the purpose of obtaining evidence for the trial of the case, and the ascertainment and determination of the rights of the parties, and the continuity and identity of the veins, and to prosecute development and other work pending litigation. *Held*, this order was within the powers of a court of equity, and being in effect an order for an inspection and survey for the discovery of the truth, was not an abuse of judicial discretion.

Nevada. *Silver M. Co. v. Fall*, 6, 116 (1870). Where it appeared that plaintiff owned the Arizona Silver Ledge south of a certain line, and defendant owned north of the line, and suit was brought to recover a deposit and prevent defendant working south of the line, on the theory that it was on the ledge, which defendant denied, it was error for the court to charge that the plaintiff must, in order to recover, establish his theory conclusively, and not merely by a preponderance of

evidence. There is nothing in section 160 of the Practice Act (which authorizes a delay in mining cases for the purpose of allowing developments to be made) to show that it was intended to make actual development the only or even the best evidence.

New Jersey. *Thomas Iron Co. v. Allentown Mining Co.*, 28 Eq. 77 (1877). Where the owner of mineral lands suspects that the adjoining owner has mined over the line, and has taken minerals from his land, and refuses to allow him to enter the mine to make an inspection of the fact, equity will grant an order of inspection.

CHAPTER XXIV.

JOINT OWNERSHIP OF MINES.

I. Rights and Relations of Joint
Owners.II. Partition of Mines.
III. Mining Partnerships.I. RIGHTS AND RELATIONS OF JOINT OWNERS.¹

EACH of the joint owners of minerals in place may mine them without the consent of the others; he may occupy and use the common property for the purpose contemplated by all, and it is no valid objection that his use is consumption. His mining is not waste. But he must account to his co-tenant for whatever mineral he extracts, in which account he may deduct the cost of extraction. He is only entitled to his proportion of whatever is mined, and may not claim to retain all that he has himself taken out, on the ground that it is no more than his proportion of all the mineral in the mine.

One joint owner who works a mine cannot maintain an action against his co-owners for their share of the expense of so doing, in the absence of an express or implied contract on their part to pay. He is confined to his remedy by account.²

The owner of an undivided interest in a mine is entitled to the possession of the whole as against one who has no title to any portion of it; but he may not exclude his co-tenant, even though he have the greater interest, and if he is unable to respond in damages, he may be enjoined from holding possession of and working the mine.

Any act of one tenant in common in reference to the joint estate will accrue to the benefit of all. Consequently, if one of several joint owners of a mining claim obtains a patent therefor, he will be treated as a trustee of the shares of his co-owners.

¹ See also Chap. VI., Div. II., C. 470 (1897); and also Pennsylvania, Act

² See Pennsylvania, Act April 25, 1850, May 6, 1891, P. L. 41.
P. L. 573; *McGowan v. Bailey*, 179 Pa. •

It will be observed that the rights and relations of joint owners of minerals in place or of mines are practically the same as those of the joint owners of land in which are deposits of minerals. The reader is referred to the chapter¹ in which the latter subject is treated, and which should be read in connection with this chapter.

The rights of co-owners of mining claims in regard to expenditure for assessment work which are dependent upon statute, are set out in Rev. Stats. 2324, and have been already treated of.²

Waring v. Cron, 11, 366 (1858). In an action of California. ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendants who are in possession of such claim, holding other undivided interests, and who claim no right to the interest sued for.

As the possession of one tenant in common is the possession of all, the mere fact that one such tenant or partner goes away and remains absent, leaving his associates in possession, creates no presumption of abandonment; nor does his refusal or delay to pay his share of the expenses of the business create a forfeiture.³ The passive acquiescence of the other partners or tenants in common in a sale of the interest of one of their number by a party having no title cannot confer any upon the vendee.

Reed v. Spicer, 27, 57 (1864). H. and P. were tenants in common of a ditch; H. conveyed all his interest to defendant, and P. conveyed all his to plaintiff by a deed of later date. *Held*, neither could be considered to have conveyed against the other's will, and the grantees became tenants in common.

Goller v. Fett, 30, 481 (1866). In an action for damages against a co-tenant for removing gold, the expense of digging the gold-bearing earth and carrying it to the mouth of the tunnel, where it was washed, should be deducted from the amount of gold which was plaintiff's share.

Melton v. Lambard, 51, 258 (1870). The owner of an undivided interest in a mine is entitled to the possession of the whole mine, as against one who has no title to any portion of it.

McCord v. Mining Co., 64, 184 (1883). The extracting of minerals by one of several tenants in common of a mining claim, without the consent or permission of the others, is not waste within the meaning of sec. 732, Code of Civ. Proc. The tenant in common of a mine may occupy it for the purpose contemplated by all, even though a portion of the ore or soil be removed. Each tenant has a right to use the mine, and so long as an estate is used according to its nature, it is no valid objection that the use is consumption. The mining lands are disposed of by the United States and acquired, for the purpose of mining, and the application of them to that purpose by the tenant in common cannot be waste. The other tenants in common would, however, in the proper action, be entitled to an accounting by the tenant who was working the mine.

¹ Chap. I, Div. IV.

² Page 265, *ante*.

³ But see Rev. Stats. 2324.

Colorado. *Omaha & Grant S. & R. Co. v. Tabor*, 13, 41 (1889).

A license to dig ore, given by one tenant in common, extends only to his interest in the mine. Evidence that a mine owner, being informed that persons had entered on a mining claim conflicting with his, under order of court, and were taking his ore, consented that another person should join them, does not establish a license as to those already engaged in mining there.

Franklin Min. Co. v. O'Brien, 22, 129 (1896). When one tenant in common, of a mining claim purchases a senior conflicting location, the purchase inures to the benefit of his co-tenant, so that he is entitled to his share in the ground in conflict.

Connecticut. *Barnum v. Iarvidon*, 25, 137 (1856). Tenants in common, who are lessees from the different owners of undivided portions of certain ore beds, are liable to account to one another for ore mined. It is not a defence to such an action that the amount mined by defendant was not more than his proportion of the ore in the ground. A co-tenant owns only his proportion of what he takes out, and must account for the balance to his co-tenants. Nor is it a good defence that he has accounted to his landlord for all that he had taken out. If he accounted for more than his proportion, he did so in his own wrong.

Marsh v. Holley, 42, 453 (1875). The right of the other co-tenants to dig for ore on any part of the estate, and deposit on any part of it the earth and debris thrown out in doing so, was not an incumbrance upon the ore rights conveyed, but was merely an inconvenience inseparable from the nature of the estate, and to which each of the co-tenants must submit.

Montana. *Brundy v. Mayfield*, 15, 201 (1895). Where part of the co-owners of a claim apply for a patent to themselves, the excluded co-owner need not file an adverse claim. On obtaining the patent, they become trustees for him. Co-tenants stand in a relation of confidence to each other, and neither will be permitted to act in hostility to the other in reference to the joint estate.

Anaconda C. M. Co. v. Butte & Boston M. Co., 17, 519 (1896). Plaintiffs owned a three-fourths and defendants a one-fourth interest in W. B. claim. Plaintiffs, on the allegation that defendants had, by deep underground workings, extracted \$300,000 worth of ore, obtained a preliminary injunction against further mining.

Held: 1. The parties were not mining partners. 2. It is not waste for a tenant in common to take ore from the common property in a skilful, careful, and miner-like manner. 3. The plaintiff, however, was entitled to the injunction under sec. 592, Code Civ. Proc. 1895, by which "If any person shall assume and exercise exclusive ownership over, or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist."

Pennsylvania. *North Pennsylvania Coal Co. v. Snowden*, 42, 488 (1862). A court of equity has no jurisdiction of an action founded on a legal title, brought by one tenant in common against an alleged co-tenant, to obtain possession and enjoyment of mining rights, whether corporeal or incorporeal.

The act of Assembly of April 22, 1856, giving a tenant in common of mines, whose right is denied or resisted, the right to apply by petition in equity, and to have the rights of the several parties adjudicated and determined according to the course of a court of chancery, conflicts with the constitutional right of trial by jury; and is consequently applicable only to cases in which the rights of the complainants are equitable.

Thompson v. Newton, 7 Atl. Rep. 64 (1886). A., B., and C. were joint owners of an oil lease. A. and B. agreed that B. should work the well in place of a former employee hired by C. C. did not assent to this arrangement, but received his share of the product. *Held*, C. was not liable to B. for his share of the expense of working the well. He might be liable to account to his co-tenants for the expense necessary for the pumpage and care of the oil produced, but he was not so liable to B., whom he had not employed.

Murtland v. Callihan, 2 Super. Ct. 340 (1896). Under the act of May 6, 1891, which gives to persons performing labor or furnishing materials in, upon or about oil or gas wells a right of action by assumption against "any joint owner, joint tenant or tenant in common, holding an interest in and operating" such well for his share, etc., a joint tenant cannot recover against his co-tenants for their share of the expense of pumping done by him against their consent. To recover under this statute, a contract, either expressed or implied, must be shown as the basis of the claim.

Johnston v. Price, 172, 427 (1896). The act of May 6, 1891, makes no change in the law as to remedies between parties or joint owners. It does not take away the remedy by bill in equity for an account. Section 1 is limited entirely to claims of strangers, and section 2 applies only to one of several joint owners who may pay the share of another for labor or material furnished by a stranger.

Harrington v. Florence Oil Co., 178, 444 (1896). One tenant in common of an oil lease may maintain a bill in equity for an account against his co-tenant.

Plaintiff and defendant being tenants in common of an oil lease, the former drilled a well under contract with the latter, and by reason of the defendant's delay in furnishing casing the well was destroyed. *Held*, that they should bear the loss thereof in proportion to their interests.

Kahn v. Old Telegraph Mining Co., 2, 13 (1877). A party Utah. confessedly owning the major part of a mine cannot be enjoined from possessing and working it by one owning the minor part, unless the latter make it appear that the former is unable to pay the damages which might be awarded against him for his wrongful acts in excluding the other from the benefit of the mine.

II. PARTITION OF MINES.¹

An interest in mines, whether it be a mineral estate severed from the estate in the soil, or a mining claim upon the public

¹ See also Chap. I., Div. IV.

domain, being real estate, may be the subject of partition, as may also property in ditches and water rights. But incorporeal hereditaments, or rights to minerals or to mine, which do not carry with them an estate in the land, are, of course, incapable of partition.

Mines are incapable of partition by setting off the surface by metes and bounds; water running in a ditch is likewise incapable of mechanical division. And, consequently, the only way to do justice between the parties to an action of partition of such property, is by sale and distribution of the proceeds, or perhaps by alternate enjoyment of the common property.

The grantee of a right to minerals from one tenant in common may not have partition of the land.

Whether or not the federal courts have jurisdiction of partition of mining claims before patent is involved in doubt.

United States. Strettell v. Ballou, 3 McCrary, 46 (1881), C. C. D. Colo. The holder of a mere possessory title cannot maintain a bill in equity for partition in a federal court. Those courts have jurisdiction of such a bill only when filed by one having title to a portion of the premises sought to be partitioned. If the statutes of the State confer jurisdiction of such a case upon the courts of the State, the complainant must resort to them.

Aspen Mining & Smelting Co. v. Rucker, 28 Fed. 220 (1886), C. C. D. Colo. Brewer, J.: "In that case [*Strettell v. Ballou*] it appeared that the title to the property in controversy was in the United States, and that the parties had jointly a possessory claim or interest, with the right to take ore therefrom, but had no other title. It was held this court had no jurisdiction, because the complainant had no title to the land. If this case established a rule of property, I should be reluctant to depart from it, even if I did not assent to its reasonings and conclusions. . . . As, however, nothing was involved save a matter of practice and a question of forum, I do not consider myself concluded by it." "(1) Courts of equity have, concurrently with courts of law, general original jurisdiction in matters of partition. (2) Federal courts, sitting as courts of equity, may administer any right of an equitable nature given by the statutes of the State. (3) Under the statutes of Colorado, partition of a mining claim held by joint owners under the possessory rights given by acts of Congress may be had, notwithstanding the legal title has not yet passed from the general government."

"The mere fact of joint ownership in a mine does not give an equitable right to a partition. Seldom can a division of a mine be made. Generally partition must result in a sale. To such property there is an unknown value; and a chancellor may well require full information as to all the relations of the parties to the property before decreeing any partition which will practically result in dispossessing one of the parties entirely."

California. *Hughes v. Devlin*, 23, 502 (1863). An interest in a mining claim is real estate of inheritance, and is subject to an action for partition. The distinction between the right to mine on the land of another and a distinct right of property in a mine, as to this right of partition, has no application to the public mineral lands of this State.

McGillivray v. Evans, 27, 92 (1864). It is impracticable for the court to make a mechanical division of the water running in a ditch, owned by tenants in common and used for mining purposes, in such a manner as to permanently do justice between the parties. In an action for partition in such a case, the only way to do justice between the parties is to order a sale and distribute the proceeds.

Smith v. Cooley, 65, 46 (1884). The owner in fee of a tract of land granted to another an interest therein, describing it as "an undivided third interest in a certain piece of mining ground," described by metes and bounds, "together with the water rights, reservoirs, and tail race belonging to the same; and it is expressly conditioned that this instrument conveys no other rights except a mining right on the premises above to the said party of the second part, his heirs and assigns." *Held*, the grantor could not maintain partition against his grantee. "A mining right upon a specific piece of ground is a right to enter upon and occupy the ground for the purpose of working it, either by underground excavation or open workings, to obtain from it the minerals or ores which may be deposited therein. By implication the grant of such a right carries with it whatever is incident to it and necessary to its beneficial enjoyment. But it did not convey the exclusive dominion of any portion of the ground so as to make the grantee a joint tenant or tenant in common with the grantor. It conveyed only a particular estate or incorporeal hereditament in land of which the grantor held the general estate." This estate is in its nature incapable of partition. It differs from a mining claim.

Illinois. *Lenfers v. Henke*, 73, 405 (1874). "The mines, when opened, in their nature were indivisible. Neither partition could be made at law, nor dower assigned by metes and bounds. The only partition that can be made is to order a sale of the mines and divide the proceeds." (*Dictum*.)

Massachusetts. *Adam v. Briggs Iron Co.*, 7 Cush. 361 (1851). "Supposing that there may be a right and estate in a mine, distinct from that of the soil in which it lies, there seems to be a peculiar fitness in resorting to equity to adjust and regulate the mutual rights of the parties. It is manifest that partition cannot be made by setting off the surface by metes and bounds, because the quantity and value of the mines and ores, and the capacity and facility of access for working them, bear no proportion to the area of the surface under which they lie. Indeed, in making partition at law, it has been found necessary to make special partition, directing the division of the profits, or the alternate enjoyment of the common property, as circumstances may require."

New Jersey. *Boston Franklinite Co. v. Condit*, 19 Eq. 394 (1869). A grantee of the right to minerals from one tenant in common cannot call for a partition of the premises.

New York. *Canfield v. Ford*, 28 Barb. 336 (1858.) A conveyance to one "and to his heirs and assigns forever" of "all the mines, ores, minerals, and metals lying or being in or upon" certain described land, "together with the right to raise, work, and carry away the same, the right to put up all buildings and to use all lands necessary for that purpose, and the right of ingress and egress for that purpose," passes a corporeal hereditament, an estate of inheritance for a part of which an action of partition will lie.

III. MINING PARTNERSHIPS.

The joint owners of a mine, which they unite and co-operate in working, constitute a mining partnership. Without any contract or agreement between them, by the act of uniting in working the mines the relation is established. Any joinder whatever by the owners in the development of the mine raises the relation. Where only one works the mine, but the others furnish the tools and provisions, there is a mining partnership; so is there where the mine is worked and managed by one in accordance with an arrangement joined in by all the joint owners.

The relationship also exists where several are jointly interested in the working of the mine, without owning the same, as under a lease or a mere mining right. But it is not created by contracts to work mines for a share of the product or an interest in the property; such contracts are contracts of employment or for services.

The differences between a mining partnership and an ordinary partnership are such as flow from the fact that in the former there is no *delectus personæ*. The principal difference is that the sale or assignment by a member of the former of his interest, or a part of it, does not dissolve the partnership. The assignee of the interest or share becomes a member, and the other members have no right to object to his admission to the company. The purchaser, although he takes no part in the management, and does not hold himself out as a partner, presumptively becomes one by virtue of the purchase. In like manner the death of a mining partner does not work a dissolution of the mining partnership. A partner, however, cannot have partition and an account without a dissolution. It follows from these principles that a member may sell his interest to whomsoever he pleases, whether a stranger or one of his associates, without consulting his partners. They have not the first right to purchase the share of any one of them who

wishes to part with his interest, and it is not a fraud on them for him to sell it to one of them or to a stranger, and there is no implied relation of trust or confidence between them that prevents his demanding and receiving a higher sum for his interest in the property than is paid to his co-tenant.

New members, having purchased their interests with a knowledge of the obligations of the company, take subject to a liability therefor and to the lien of the other partners, to have the partnership property applied to the payment of debts and their advances on account of the partnership.¹ Where in the management of the partnership affairs all parties cannot agree, the majority in interest may decide what is necessary and proper for carrying on the business of the company, provided the success of the enterprise requires the exercise of such a power. Such a power is often conferred by regulation or by-law adopted by the partners; but even in the absence of such a regulation, if it has been the custom of a company to authorize contracts by a majority vote, and this has been acquiesced in by the minority, it will be considered the law of the company, a part of the original contract between the members. Most often, however, the management is in the hands of one, or a number less than the whole, of the members. As to the power of one partner to bind the other by his acts, the law has been laid down in Colorado² to be that the same principles apply to both mining and ordinary partnership, that every partner has full and absolute authority to bind all by his acts and contracts in relation to the usual business of the firm. To this, however, a limitation must be laid down. Every member may purchase articles essential to carry on the business, and the other members will be liable for the price. He may even do this on credit, if that is the necessary or usual course of doing business. And members, especially the managing partner or the superintendent, may bind the company upon such contracts as are usual and necessary in the ordinary prosecution of the work of mining, as by hiring labor and purchasing supplies. But something more will be required to raise the presumption of liability arising from persons holding themselves out as mining partners, than would be necessary in the case of ordinary partners. One may not bind the company

¹ The liability which is stated above to be general is confined within narrower limits in *Patrick v. Weston*, *post*, p. 760.

² *Higgins v. Armstrong*, 9 Colo. 38.

by promissory notes, by bill of exchange or by acceptance, unless he has express authority to do so, or his act is subsequently ratified. He may not borrow money on the credit of the firm. A mining partnership is not a trading partnership, and the managing partner can only incur those liabilities to be binding on the partnership which are necessary to the carrying on of the business of working a mine in the usual manner. One partner, therefore, cannot bind the rest by the employment of an attorney to prosecute and defend litigation concerning the title to their property.

The mining ground is in equity, for the purposes of a settlement of partnership affairs, treated as partnership property, and each member has a lien upon the partnership property for the debts due the creditors of the concern, and for moneys advanced by him for its use. This lien is enforceable in equity. It has no connection with the possession; it may exist in favor of one out of possession. A purchaser of an interest in the mine takes subject to it, unless he is a *bona fide* purchaser for valuable consideration without notice; and notice will be presumed, as the very existence of the partnership puts the purchaser upon inquiry. The liability of the members of a mining partnership is the same as those of an ordinary partnership. It is a joint liability; each member is liable for the full amount of the indebtedness, not merely for his proportionate share thereof.

A member of a mining partnership may, at any time, withdraw from the partnership, without parting with his interest in the mine. This may be done by notice communicated to the other partners, and a posted notice addressed to those employed by and dealing with the managers. Such withdrawal does not dissolve the partnership, which may be continued by the other owners; but the co-tenant who has withdrawn may maintain an action for his share of the proceeds against the managers, without joining all his co-tenants.

A joint owner of a mining claim which is being worked is entitled to an account for his share of the profits, whether he be treated as a tenant in common or a partner. It has even been held that he may sue for it as money had and received to his use.

It seems to be generally held that the joint owners of a ditch operated for the purpose of supplying water to miners are to be treated as mining partners; though some doubt is cast upon this by Sanderson, C. J., in *Bradley v. Harkness*, 26 Cal. 69.

There may, however, be a partnership in the working of a mine subject to the law of ordinary partnerships. The working of a mine has been denominated a species of trade, and if it is made the subject of a partnership agreement, the relationship arising thereout is a commercial partnership. A mining partnership arises only by implication from co-operation in the working of joint property. A commercial partnership arises from agreement. In such a case new members cannot be intruded without the consent of the others. Such an ordinary trading partnership arises from an agreement to engage in a mining adventure under a firm name, to share profits and losses equally, and purchase a mine. If one of the partners, under such an agreement, were to convey his interest in the mine to another, the grantee would not become a member of the firm, entitled to his rights under the agreement. He would only be a tenant in common with the remaining partners, and they, if they should continue to work the mine, would be mining partners. But there would be a dissolution of the partnership under the agreement.

A provision in an agreement between members of a mining company, that on failure to pay certain assessments a member shall forfeit his share, is void as an attempt to create, not a forfeiture, but a mode of transferring title.

Where one member of a mining partnership advanced the money to pay for his associate's share of the ground, and an agreement was made between them that he should control the interests of the other and receive all the proceeds until he was repaid, and under this agreement he had possession of the ground, there was such part performance as would take the contract out of the Statute of Frauds, and specific performance would be enforced.

The principles governing mining partnerships have been admirably expressed in the California Civil Code, 1885, secs. 2511-20,¹ which should be consulted by the reader.

The law of mining partnership, as above stated, is not recognized in Pennsylvania (and perhaps would not be recognized in other of the States). There, joint owners of mines and oil wells are, in the absence of agreement making them partners, tenants in common. The presumption is that they hold the same relation during the development and working of mines as before it began.

¹ See also Idaho Rev. Stats., secs. 3301-09; Montana Civ. Code, 1895, secs. 3350-59.

Kahn v. Central Smelting Co., 102, 641 (1880).
United States. The joint owners of mines which are being worked constitute a mining partnership. (*Skillman v. Lachman* quoted and approved.) Such a partnership differs from an ordinary partnership in that the *delectus personarum* has no place in it. A member of such a partnership may, without dissolving it, convey his interest in the mine and the business. A joint owner of a mining claim is entitled to an account for his share of the profits, whether he be treated as a tenant in common or a partner.

Santa Clara M. Assn. v. Quicksilver M. Co., 17 Fed. 657 (1882), C. C. D. Cal. Where a mine, together with the surrounding lands, is conveyed to, and the mine is worked by, an unincorporated association of individuals in the usual mode, as in the case of mining partnership in California, the members of the association are tenants in common of the mine and the land so held.

Where a bill is filed by a member of a mining partnership to wind up the affairs of the association, some of the members being omitted from the bill because of the impracticability of bringing them all before the court, and a decree is made dissolving the association, directing the mines and lands of the company to be sold, the debts to be paid, etc.; and a sale of the mines and lands of the association is made in pursuance of the decree, the title to the undivided interests in the mine and lands of those not parties to the suit will not be affected by the decree and sale.

Bissell v. Foss, 114, 252 (1885), affirming *First Nat. Bank v. Bissell* (C. C. D. Colo.), 2 McCrary, 73; 4 Fed. 694 (1880). B., H. and F. each owned one-fourth of a mine which was being worked by them. The remaining fourth was owned by a number of persons who wished to sell, whereupon B. and F. had a conversation, at which they fixed upon a plan by which this fourth should be bought for the benefit of B., H. and F. F. communicated the plan to H., who did not assent to it, and it fell through. F. did not report this to B., but he and H. then purchased this interest for themselves. B. claimed to be entitled to one-third of this. It was held that he could not demand any part thereof; he had suffered no wrong at the hands of H. and F. either by reason of any contract or relation of trust between them. The obligation of F. to inform B. that their plan had not received H.'s assent could not be enforced *in foro exterioro*.

Field, J., after quoting *Kahn v. Smelting Co.*, 102 U. S. 641, said: "This case settles two propositions: first, that the members of a mining association have no right to object to the admission of a stranger into the association who buys the share of one of the associates; and, second, that the sale and assignment by one of the associates of his interest does not dissolve the mining partnership. It follows from these propositions, that one member of a mining partnership has the right, without consulting his associates, to sell his interest in the partnership to a stranger, and that such a sale injures no right or property of the other associates. Much less does a purchase by one associate of the share of another inflict any wrong upon the other members of the partnership. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one

partner to a stranger, or to one of the associates, of his share in the property and business of the association."

Abel v. Love, 17, 233 (1861). The joint owners of a California ditch may be regarded as partners entitled to share in the profits derived from the business of carrying on the ditch or the sales of water. One joint owner may sue another for his share of these profits as money had and received to his use.

Skillman v. Lachman, 23, 199 (1863). "Whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that when the several owners unite and co-operate in working the mine, then a new relation exists between them, and, to a certain extent, they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has also some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership. Still there may be a partnership in the working of a mine, subject to the rules relating to an ordinary partnership in trade. And this relation may be constituted either by express stipulation or by implication deduced from the acts of the parties. But in case of an ordinary mining partnership, something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners, than would be necessary in the case of an ordinary partnership."

In the case of mining partnerships the law does not imply in a partner or a managing agent the authority to execute a promissory note in the name of the company. Such authority must be expressly shown.

Wiseman v. McNulty, 25, 230 (1864). In order to have a forfeiture take place, there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues. Tenants in common of mining land, acting under a company name, are incapable of taking or holding, in the name of the company, the interest of any of the tenants by forfeiture. The term "forfeiture" in its common law significance has no application to the rights, interests, or remedies of the several persons composing a mining association. A provision in an agreement between the members of such an association that on failure to pay certain assessments a member shall forfeit his claim or share to the company, attempts to create not a forfeiture, but a mode of transferring title, which will not be recognized.

Henderson v. Allen, 23, 519 (1863). A., claiming to be in possession of a tract of coal-bearing land, agreed with B. and C. that they should prospect for coal until they struck a particular seam, they to do all the work until they struck the seam and have two-thirds of the claim; after they struck the seam the parties jointly to prosecute the work, A. paying one-third of the expenses, B. and C. two-thirds. *Held*, this agreement did not create the relation of landlord and tenant, but of tenants in common or partners in mining; and the action of unlawful detainer was not the proper remedy for A. if excluded from the premises by B. and C.

Bradley v. Harkness, 26, 69 (1864). Sanderson, C. J.: "In the absence of any special facts constituting them something else, the pro-

prietors of ditches in the mining districts are tenants in common of real estate, and their rights in the ditch and in the profits arising from the sales of water, although in the latter respect analogous to those of copartners, are governed by the law of tenancy in common. The ditch is real estate, and each proprietor buys in or sells out or incumbers his interest at pleasure, regardless of the knowledge or consent or wishes of his co-proprietors, and without affecting the legal relation existing between them beyond the going out of one and the coming in of another. This cannot be done where a copartnership exists. . . . A tenancy in common results from a rule of law by which it is also controlled and governed. A partnership, on the contrary, is the result of agreement between parties, which also supplies the rules for its government. The former relation is undisturbed by a change of tenants, but the latter admits of no change as to its members; and where a change takes place by the consent and agreement of all the parties concerned, the old firm is thereby dissolved and a new one created."

Duryea v. Burt, 28, 569 (1865). The mining ground belonging to and worked by a mining partnership, and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members as a portion of the capital, is, in equity, for the purpose of a settlement of partnership affairs, to be treated as partnership property. Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors of the concern and for moneys advanced for its use, which he may enforce in equity. A purchaser of the interest in a mine of a member of a mining partnership takes it subject to this lien, unless he is a purchaser in good faith for a valuable consideration without notice. Such notice will be presumed; for the existence of the partnership puts the purchaser upon inquiry.

Dougherty v. Creary, 30, 290 (1866). Parties owning a mining claim as tenants in common, and engaged in working the same, are partners. Where all those jointly interested in mining property cannot agree, the majority in interest have the power to decide what may be necessary and proper for carrying on the business for the joint benefit of all, provided the exercise of such power is necessary and proper for the success of the enterprise.

Settembre v. Putnam, 30, 490 (1866). The defendants, being the owners of a two-thirds interest in a mine, contracted with the plaintiff verbally that he should explore and develop the mine, they furnishing the tools and provisions, and if it should prove valuable they would give him an equal share of their interest. This was a mining partnership, and entitled the plaintiff to an account of profits. After the mine was found to be valuable, it was agreed to purchase the land from the owners, for the benefit of the plaintiff as well as of the defendants. The title was, in bad faith, taken in the name of the defendants. *Held*, they were trustees for the plaintiff, and he was entitled to a conveyance of his share of the interest in the mine, and also that acquired by purchase.

In the action for dissolution and an account, the owner of the other third should have been made a party.

McConnell v. Denver, 35, 365 (1868). An unincorporated ditch company organized for the sale of water to miners and others is of the

same nature as a mining partnership. The superintendent or managing agent of such a company has no authority to bind the company by a promissory note given for materials used by the company, unless such authority has been expressly conferred on him, or may be implied from his acts recognized by the company, with full knowledge of them at the time.

Decker v. Howell, 42, 636 (1872). A strict partnership may exist in the working of a mine which is subject to the incidents of a trading partnership. There is nothing in the nature of the business of mining to forbid such a contract. If by the terms of a contract of mining partnership it appears that the confidential relations of an ordinary partnership are established, and that the firm is not subject to the intrusion of other partners at will, the reason of the rule that restricts the power of a single partner fails. The parties are strictly partners, not by reason of their common ownership of the mine, but as the result of their own agreement.

If two persons agree to engage in a mining adventure under a firm name, to share profits and losses equally and purchase a mine, they are ordinary trading partners. Each exercised his choice in the selection of the other as his copartner. If either had conveyed his interest in the mine, the purchaser would not be subrogated to his rights under the agreement. The purchaser and the remaining partner would have become tenants in common of the mine and its working, subject to the rules applicable to mining partnerships.

Jones v. Clark, 42, 180 (1871). The managing partner or superintendent of a mining partnership cannot bind the firm, except upon such contracts as are usual and necessary in the ordinary prosecution of the work, unless specially authorized. He cannot bind the company by a promissory note, unless authorized to execute it, or it has been subsequently ratified by the company. Where a promissory note, signed by the superintendent of a mining company as such, was given in payment for property which the company used, and such use was a beneficial one, and all the members soon after the execution of the note knew of its existence and believed it to be a company note and acquiesced in payment of interest on it, there was a sufficient ratification to make it binding on the company. New members of a partnership, having purchased interests therein with a knowledge of partnership debts, are subject to the payment thereof. In this case, the holder of the note having obtained an interest in the company brought an action for an account. Members of the company who had parted with their interests were not necessary parties, though they would have been in an action to collect the note. Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits, or the particular company has established a different rule, — the only differences generally existing being such as flow from the fact that in such partnerships there is no *delectus personæ*.

Taylor v. Castle, 42, 367 (1871). A mining partnership is not dissolved by the death of a partner, nor as a consequence of a sale of an interest by a partner to a stranger. The purchaser presumptively becomes a partner, although he takes no part in the management of the partnership affairs, and does not hold himself out as a partner.

There being no written regulations or by-laws of the company, and it having been shown that their usual way of doing business was to authorize contracts by majority votes, in which the minority acquiesced, this usage must be taken as a part of the contract of partnership.

Nisbet v. Nash, 52, 540 (1878). If one partner and part owner in a mining claim conveys his interest to a stranger, the latter becomes thereby a partner with the other owners. A partner cannot have partition and an account without a dissolution of the partnership.

Clark v. Ritter, 59, 669 (1881). In an action for dissolution of a mining partnership and an account, it appeared from plaintiff's evidence that prior to the partnership agreement, to which H. was neither party nor privy, one of the joint owners of the claim mortgaged her claim to H., and subsequently to said agreement H. purchased the mortgaged interest at a foreclosure sale. *Held*, H. was entitled to a nonsuit.

Smith v. Cooley, 65, 46 (1884). "The working of a mine under a bare mining right has been uniformly considered by courts of equity as a species of trade. Hence the legal relations existing between two or more persons interested in such a right is that of qualified partnership, and the remedies relating to a mining partnership are available for the assertion or violation of any right arising out of it."

Morganstern v. Thrift, 66, 577 (1885). The lien of a mining partner provided for in sec. 2514, Civil Code, does not give either partner a right of possession to the partnership property to the exclusion of the other. The lien has no connection with the possession. If one has actual possession, claiming to hold as against the other, the lien exists in favor of the latter.

Miller v. Butterfield, 79, 62 (1889). A hotel keeper and a prospector entered into a written agreement "to share equal in any mine which we may buy or find from this date. I, B., offset my time against my board with M." The meaning of this was that they should be tenants in common of any mine bought at their common expense, or discovered and located pending the agreement, and while it was performed by M.

M. failed and went out of the hotel business. He did not and could not board B. *Held*, he was entitled to no interest in mines purchased by B. with money raised on his individual credit.

Quinn v. Quinn, 81, 14 (1889). An agreement by two persons for working a quarry, the expenses of which were to be paid out of the proceeds, the business to be managed by one, the other to give his whole time thereto, and the net profits to be equally divided, constitutes a strict partnership as distinguished from a mining partnership. "For even if it be assumed that there could be a mining partnership in such a thing as a quarry, the partnership was created by the express agreement of the parties."

Stuart v. Adams, 89, 367 (1891). A member of a mining partnership is liable to third persons, in respect to obligations of the partnership, jointly with his copartners for the full amount of the indebtedness, and not merely for a proportionate share.

The superintendent of a mine has a right to expend for the partnership, moneys in the purchase of articles necessary for the conduct of the mine in the usual manner, without express authority.

A contract to work defendant's mine, pay one-half the expenses

thereof, and receive one-half the product for his labor, does not establish a mining partnership under Civ. Code, 2511, 2512. It is a contract for services.

Chung Kee v. Davidson, 102, 188 (1894). A. and B., the owners of a mine, made a conveyance thereof to C. and D. as security for a debt, and it was agreed between them that A. and B. should remain in possession and operate the mine, and that the profits should be applied to the payment of the debt. This did not constitute a partnership. The profits were not received by C. and D. as profits, but as payment of the debt.

Berry v. Woodburn, 107, 504 (1895). The parties entered into an agreement by which if plaintiff should go to T. County and procure a paying quartz mine, defendant would pay him his expenses and big wages, and if the mine proved to be a paying one, would give him, in addition, an interest in the mine. This was a contract of hiring, and not a mining partnership, within the definitions in sections 2511 and 2512 of the Civil Code.

Lawrence v. Robinson, 4, 567 (1879). An agreement **Colorado.** to engage in the business of prospecting for and developing lode mining property for the joint use of the parties is in the nature of a partnership, under which each becomes the agent of the other.

Where no time of duration is limited by such an agreement it is determinable, under equitable restrictions, at pleasure, but such determination cannot operate to defeat rights accrued under it while in force.

Charles v. Eshleman, 5, 107 (1879). A mining partnership exists where several owners of a mine co-operate in working it, and although the relation is governed by many of the rules relating to ordinary partnership, it differs therefrom in many particulars. A member may assign his interest without the consent of his associates, and the partnership is not thereby dissolved; the assignee becomes a member without the consent of the other members. Death does not dissolve the partnership. A member may not bind his associates by engagements with third parties without express authority. In this case, *held*, one could not employ an attorney in the name of all to prosecute and defend litigation concerning the title of the property.

Manville v. Parks, 7, 128 (1883). In commenting on the definition of a mining partnership given in *Charles v. Eshleman*, the court say, "We apprehend that this language of the court, while applicable to the case before it, was not intended to restrict the definition of such partnerships solely to cases where a mine is owned by the parties working it; for it is evident that a mining partnership may exist where the parties have an interest merely in the working of the mine, or in carrying on mining operations, as where they own the mine itself." Such a partnership was held to exist between the grantees named in a deed held in escrow, who arranged between themselves that one of their number should take charge of the mine as manager.

The members of such a partnership have authority to bind each other by dealings on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of working the mines, as for the purchase of tools, powder, fuses, etc.

Higgins v. Armstrong, 9, 38 (1885). An association of individuals for the purpose of operating mines and smelting works at a certain place, is a mining partnership. The distinctions between a mining and an ordinary partnership, as given in *Charles v. Eshleman* and *Manville v. Parks*, are repeated.

So far as the power of a partner to bind the firm in the usual course of the partnership business is concerned, the same principles apply to both mining and ordinary partnership. Every partner has full and absolute authority to bind all the partners by his acts or contracts in relation to the usual business of the firm. He may purchase articles essential to the carrying on of the business in its usual course, and the other members will be liable for the price. The article purchased in this case was charcoal.

Meagher v. Reed, 14, 335 (1890). An agreement was entered into between M., R. and two others to procure a lease to a certain mining property, which they were to work jointly, each to have a fourth interest in the lease; and they were to share the expenses and the profits equally. This was held to be a mining partnership, and not dissolved by the sale of his share by one of the partners. "It is undoubtedly a general rule that when two or more persons acquire mining property solely or principally for the purpose of extracting the ores, in the absence of an express intention to enter into a general commercial partnership in the conduct of their mining operations, the relation existing between them in the transaction of their common business is a mining partnership, and not a general partnership." "The leasehold having been acquired in pursuance of the above agreement was partnership property.

The agreement was not within the Statute of Frauds. It was not for the transfer of land, but only provided for a subsequent transfer. The property, which was, under its terms, subsequently acquired and title taken in the name of M., was held by him in trust for the partners.

Sluter v. Huas, 15, 574 (1890). Where several tenants in common of a mine employ a manager to work and extract the ores therefrom, and account to the owners for the proceeds, thus forming a mining partnership, one of the owners may withdraw from the enterprise without dissolving the partnership as to the others; and if the others continue to employ the manager to work the mine, the withdrawing partner may maintain an action in his own name for his share of the proceeds thus coming into the manager's hands, without making his co-tenants parties to the action.

Such withdrawal may be accomplished by a notice to the manager, and by him communicated to the other owners, by which the manager's employment was terminated so far as the interest of the party notifying was concerned, and a posted notice of the same fact to all employed by or dealing with the manager.

Patrick v. Weston, 22, 45 (1895). Certain parties, being tenants in common of certain mining claims, formed a mining partnership for the purpose of working them. One of the partners transferred his interest in the claims and in the partnership to W. Held, that the other partners could not charge W. with a share of a judgment and of the expenses of litigation founded on a cause of action which arose before he became a partner. "Upon principle, we think that an incoming

partner ought not to be liable for debts contracted prior to his acquiring an interest in the property, and prior to his becoming a member of the mining partnership. Cases in which the incoming partner has been held liable may all be resolved into instances in which the real estate was either purchased by the partnership with partnership funds, or was brought into the firm as a part of the capital stock by the individual members of the copartnership. In the case at bar, as we have seen, there is no evidence of a partnership in the ownership of the mines; the evidence being to the effect that an ordinary mining partnership was formed for the purpose of prospecting and working the properties."

Hawkins v. Spokane H. M. Co., 28 Pac. 433 (1891). Plaintiff owned a seven-eighths interest in a placer mining claim, in which one-eighth was owned by defendant. The latter worked the claim and practically excluded plaintiff from any part in the management of the work, but invited him to take part as a worker simply.

Held, that there existed between plaintiff and defendant a mining partnership, under Rev. Stats., sec. 3301 *seq.*; that "those owning a majority of the shares or interests in a mining partnership have the right to control its method of working" (sec. 3309). Consequently plaintiff was entitled to an injunction restraining defendant from working the mine, except in the manner directed by plaintiff.

Hawkins v. Spokane H. M. Co., 33 Pac. 40 (1893). Under the Idaho Statutes (Rev. Stats., secs. 3301-09) the party or parties owning a majority interest in a mining claim or a mine have the right to control and manage it, subject to the laws of the State and the United States.

Morgan, J.: "A mining partnership, by virtue of our statute, in all its essential elements is precisely like a corporation."

"The owners are tenants in common only so far as the possible right to a common possession. This common possession is of no practical benefit to the minority owner, except to give him the right to complete inspection and examination, so far as may be necessary, to ascertain the value of the property, and the methods in use for working the same, if it is being worked; in short, so far as may be necessary for the complete protection of his interest, and to enable him to dispose of his interest, if he so desires, and of working the mine, if not forbidden or prevented by the majority interest."

(See this case for a paraphrase of the statute.)

Illinois. State Nat. Bank v. Butler, 149, 575 (1894). A., by an agreement in writing, sold to B. the one-fourth interest in a described mine, under conditions, among which were the following: (1) a royalty on all coal hoisted and sold each month was to be paid to A. before anything else was paid out of the proceeds of the mine; (2) A. was to have entire management and control of all matters in connection with the mine; (3) a settlement was to be made at the end of each month, and one-fourth of the gains or losses was to belong to B., and the remainder to A.; (6) A. was to have an option on B.'s interest, if she desired to sell it; (7) if the parties should decide to connect tile works with the mine, the expenses, profits and losses of the same were to be borne in proportion of one to three.

B. was held to be a partner as to any person having notice of the agreement, and doing business with A., in the line of business covered

by it. It created between A. and B. the relations of co-owners of the mine, of joint proprietors of the business of operating it, and of principal and agent for the management and control of all matters in connection with the mine.

"Tenants in common or joint tenants of a mine or quarry may or may not be partners, and the mine or quarry itself may or may not be a part of the common stock. But it is highly inconvenient, if not altogether impossible, for co-owners of a mine or quarry to work it themselves without becoming partners, at least in the profits of the mine; and persons who work a mine or quarry in common are regarded rather as partners in trade than as mere tenants in common of land. The co-owners of mines may be partners, not only in the profits, but also in the mines themselves. The co-owners are then partners to all intents and purposes, and their mutual rights and obligations are determined by the law of partnership as distinct from the law of co-ownership."

Kentucky. *Judge v. Braswell*, 13 Bush, 67 (1877). A partnership entered into for the purpose of engaging in mining business, "said enterprise to embrace the purchase of the title to any coal or mining lands in fee, and the leasing of the same, as the said firm may determine," is a non-commercial partnership, and one partner has no power to purchase lands for and in the name of the firm.

Michigan. *Burgan v. Lyell*, 2, 102 (1851). One of the members of a partnership formed to prosecute the business of mining engaged the plaintiff to labor for the company in their mining operation. The company was bound by this contract. "It is a matter of no legal moment whether some of the partners were dormant in fact, or whether they subsequently assented or dissented from the proceedings of those with whom they had intrusted the management of their company business; they would nevertheless be jointly liable to the plaintiff for his work."

Missouri. *Snyder v. Burnham*, 77, 52 (1882). If two or more persons acquire a mining claim for the purpose of working the same, and actually engage in working the same, and share according to the interest of each the profits and expenses, the partnership relation subsists between them, although there is no express agreement to become partners or to share in the profits and losses.

"It may be concluded that when persons acquire interest in lands, apparently for the sole purpose of working the mines in them, they must be considered as entering into a commercial partnership." *Rockwell on Mines*, 578.¹

Montana. *Nolan v. Lovelock*, 1, 224 (1870). Tenants in common of mining ground, which they worked together, paying expenses out of the proceeds and dividing the residue, if any, are mining copartners.

One member of a mining partnership has authority to bind the firm for what is necessary and useful in the undertaking, such as the hiring of labor, unless there is an express agreement between them, of which the other contracting party had notice, that this power of binding each other should not exist.

¹ In view of what has been said on pages 752, 756, *ante*, this statement is doubted.

Boucher v. Mulverhill, 1, 806 (1871). A mining regulation provided "that no claim shall be recognized as legally held, unless the prior claimant has personally pre-empted the same, with the exception of three claims allowed the discoverers for their prospecting partners." "Prospecting partners" is not to be construed by the law of strict partnership. It includes those who furnish money and provisions, for which they are to receive interests in the mining ground that may be discovered.

Southmayd v. Southmayd, 4, 100 (1881). A rule peculiar to mining partnerships is that a partner may sell and convey his interest without working a dissolution, the purchaser becoming a member of the firm.

A mining partnership existed under a verbal agreement that one partner should control the interest of the other, and receive all the proceeds until he was paid the purchase price of the interest of the other. There was actual and constructive possession under this agreement. *Held*, though no money was paid down by the other party, there was such a part performance as to take the contract out of the Statute of Frauds, and specific performance would be enforced.

Harris v. Lloyd, 11, 390 (1891). "In the absence of a special contract, there is no relation of trust or confidence between tenants in common, who had been partners in the development of lode mining claims, which prevents one of them from demanding and receiving a higher sum for his interest in the property than is paid therefor to his co-owners."

In an action by former owners of a mining property to recover a share of a sum of money paid to a co-owner as additional consideration for the sale of the property, it was alleged that the plaintiffs and defendants had formed a mining partnership to develop the property, sharing expenses and profits in proportion to their respective interests. There was no allegation that there was a partnership for the purpose of selling the property; and it appeared that before the sale a settlement had been made between them, and there was no contract for further mining. *Held*, the plaintiffs could not recover, they and the defendants being tenants in common and nothing more.

Anaconda C. M. Co. v. Butte & Boston M. Co., 17, 519 (1896). Plaintiffs owned a three-fourths and defendants a one-fourth interest in W. B. claim. Plaintiffs, on the allegation that defendants had by deep underground workings extracted \$300,000 worth of ore, obtained a preliminary injunction against further mining.

Held, the parties were not mining partners. "A mining partnership is formed by reason of the existence of certain facts described in the statute. Those facts are (1) That two or more persons shall own or acquire a mining claim for the purpose of working it, and extracting the minerals therefrom; that is to say, the relation arises from the ownership of the shares or interests in the mine. This is the first fact as a foundation for a mining partnership. (2) The second fact required to exist is, that such owners actually engage in working the mine." In this case the second fact is wanting.

Mallett v. Uncle Sam G. & S. M. Co., 1, 188 (1865). **Nevada.** Where one tenant in common, after having become associated with copartners in the development of a claim, voluntarily leaves it in

the possession of his co-tenants, and refuses to bear his just proportion of the expenses incurred by them in the development of it, and afterwards brings an action in equity, relief will be refused until he has paid his full proportion of the expenses incurred in such development.

Craw v. Wilson, 40 Pac. 1076 (1895). A partnership agreement to locate mining claims is within the Statute of Frauds, and where a claim has been located in the name of one partner under an oral agreement, no relief will be given to the other partners, unless partnership capital was employed in the acquisition of the claim. In the latter case, equitable relief will be given on the ground of a resulting trust.

Rhea v. Tatham, 1 Jones Eq. 290 (1854). A., B., North Carolina. C., and D. entered into a partnership to buy land from

the State, and work the same for gold. A. and B. only gave bonds, with sureties, for the purchase money. All except A. left the State, abandoned the work for several years, gave him no aid, and allowed him to be pressed for the money. He, in good faith to relieve his sureties, surrendered his land to the State, and afterward, under another act, purchased a pre-emption to the same tract, which he sold for a sum of money. *Held*, neither B., C., and D., nor their assigns, could hold A. to account for this money.

Rhea v. Vannoy, 1 Jones Eq. 282 (1854). A., B., C., and D. entered into a written agreement to purchase lands and mine them as partners. One of the provisions of the agreement was that such disposition was to be made of the property as the majority might deem advisable. Land was purchased under statutory sales, the legal title remaining in the State. The adventure did not pay, and was deserted by B., C., and D., who left the State, insolvent. A., to relieve his sureties, and avoid further liability for the unpaid purchase money, disposed of the lands for the best price obtainable. *Held*: 1. The abandonment of B., C., and D. superseded the contract for the concurrence of a majority; 2. None of them had any equity against A.'s disposition of the property, especially as against a purchaser at a fair price without notice. All that they could ask would be an account of the money received by A., and of any rents or profits arising out of the adventure.

Babcock v. Stewart, 58, 179 (1868). The manner in Pennsylvania. which oil interests are sold, divided and subdivided while work is going on, does not affect the application of the rules as to the liability of incoming partners on contracts made before they became partners in a firm whose purpose is the mining of oil.

Grubb's Ap., 66, 117 (1870). H. B. Grubb, owning one-sixth of the ore banks, died, and in the partition of his real estate, in 1836, it, including his interest in the ore banks, became the joint property of his two sons, E. and C. They entered into a partnership to mine ore, and manufacture and sell iron. The purchase money for the land was to be paid out of the ore dug. The land was not conveyed to the firm, but was entered on the books and carried in the firm accounts. *Held*, not to have been brought into the partnership, and that E. and C. should account to one another, — not as partners, but as tenants in common.

Dunham v. Loverock, 158, 197 (1893). Tenants in common may become partners, like other persons, where they agree to assume that relation towards each other; but the law will not create the relation

for them as the consequence of a course of conduct and dealing naturally referable to the relation already existing between them, which makes such a course of conduct to their common advantage.

An agreement between two tenants in common of an oil lease to drill an additional well on the leasehold, at the common cost of the co-tenants, will not, as between themselves, create a partnership. In the absence of a distinct agreement between them that their relations to the property and to each other should be changed, the presumption is that the old relation continued, and that they treated with each other as owners of separate interests in an undivided lease.

Butler Savings Bank v. Osborne, 159, 10 (1893). Tenants in common engaged in the improvement or development of the common property will be presumed, in the absence of proof of a contract of partnership, to hold the same relation to each other during such improvement or development as before it began. As to third persons, they may subject themselves to liability as partners by a course of dealing or by their acts and declarations, but as to each other their relation depends on their title, until by their agreement with each other they change it.

When tenants in common of an oil lease agree to carry on operations upon their land, each contributing towards the expenses in proportion to his respective interest in the land, they will be considered, with respect both to themselves and third persons, as the ordinary owners of land, working their respective shares of the wells, responsible only for their own acts, subject to no laws of partnership whatever, and possessing distinct rights in the property.

Randall v. Merideth, 76, 669 (1890). It has been generally held that mining partnerships are non-trading partnerships, and that the individual members of the firm are without power to borrow money on the credit of the firm, unless the power be given otherwise than by implication from the ordinary nature of the business.

CHAPTER XXV.

MINERS.

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| I. Wages of Miners.
A. Manner of Payment.
B. Lien and Preference. | II. Health and Safety of Miners.
III. Health and Safety Statutes in their
Relation to the Law of Negligence. |
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I. WAGES OF MINERS.

A. *Manner of Payment.*

IN few of the relations of master and servant has the legislature so prescribed the manner of the performance of the obligations arising from the contract, and limited the capacity of the weaker party to contract to his own injury, as in the matter of the payment of the wages of miners. As a class, these men seem to be regarded by the law maker as particularly obnoxious to oppression and injury by their employers. The statutes looking toward their protection in this regard seek to accomplish this end by three means. First, by prescribing in what payment must be made, or by forbidding payment in certain enumerated articles or obligations.¹ Second, by prescribing the time when payment of wages must be made.² Third, by prescribing regulations and inspection of the weighing of coal in those mines where weight is the measure of wages.³

¹ Indiana, Horner's Rev. Stats. 1896, sec. 3878 f, g; Iowa, Laws 1888, ch. 55, secs. 1, 2; Rev. Code 1888, tit. xl., ch. 8, pp. 595-6; Missouri, Gen. Stats. 1889, sec. 7058-60; New Mexico, Act Feb. 17, 1897, ch. 11, p. 27; Pennsylvania, Act June 29, 1881, P. L. 147; Act May 20, 1891, P. L. 96; Act June 9, 1891, P. L. 256; West Virginia, App. Code 1891, p. 1002, pars. 1, 2; Wyoming, Laws 1890, ch. 82, secs. 1-4.

² Indiana, Horner's Rev. Stats. 1896, sec. 3878 e; Iowa, Act April 14, 1894, p. 95; Kansas, Act March 10, 1893, p. 270;

Maryland, Act April 4, 1896, p. 221; Missouri, Gen. Stats. 1889, sec. 7059; Act April 20, 1893, p. 183; Ohio, Act May 4, 1891, 88 O. L. 553; New York, Laws 1895, ch. 791, p. 556; Pennsylvania, Act May 20, 1891, P. L. 96; Wyoming, Laws 1890-91, ch. 82, secs. 1-4.

³ Alabama, Act Dec. 17, 1894, p. 245; Illinois, Hurd's Rev. Stats. 1895, ch. 93, secs. 20-25; Indiana, Horner's Rev. Stats. 1896, sec. 5480 a, b; Iowa, Laws of 1888, chs. 53, 54; Rev. Code 1888, tit. xi., ch. 8, pp. 594-5; Kansas, Act March 13, 1893, p. 271; Kentucky, Barb. & Car. Stats

The constitutionality of all these acts is more or less in question. The discussion of this point is not within the scope of this work, but the cases in which it has been raised in regard to the statutes enumerated are collected below.

Illinois. *Reinecke v. People*, 15 Ap. 241 (1884). The act of June 14, 1883, "to provide for the weighing of coal at the mines," which provides that every mine owner shall furnish a standard track scale upon which all coal hoisted from the mine shall be weighed before it is loaded on the cars, and that the weight so determined shall be considered the basis upon which the wages of persons mining coal shall be computed, and which authorizes the miners to employ a check weigher to keep an account thereof, does not apply to a mine which is operated by machinery and where the men are paid by the day.

Jones v. People, 110, 590 (1884). Act of June 14, 1883 (see *Reinecke v. People*, ante), does not apply where the mine owner has contracted to pay his employees in some other way than according to the weight of the coal dug, *e. g.* when the miners were paid, as in this case, so much for each box of coal mined.

Millett v. People, 117, 294 (1886). The act of June 14, 1883, as amended by the act of June 29, 1885, which, among other things, provides that all coal produced in the State shall be weighed as provided in the act of 1883, and that a correct record of the same be kept in a prescribed manner, at the expense of the owner, agent, or operator, is unconstitutional. It deprives mine operators of the liberty of contracting. If the purpose of the statute is to furnish needful information to the public, it is void, as taking property for a public use without compensation. Sec. 29, art. 4, of the Constitution, enjoining legislation in the interest of miners, applies only to their personal safety.

Froerer v. People, 141, 171 (1892). Sections 1 and 2 of the act of May 28, 1891, entitled "An act to provide for the payment of wages in lawful money and to prohibit the truck system, and to prevent deductions from wages except for lawful money actually advanced," which attempts to prohibit persons engaged in mining and manufacturing from keeping a truck store, or being interested in or controlling any store for the furnishing of supplies, tools, clothing, provisions, or groceries to their employees while so engaged in mining or manufacturing, is unconstitutional. It violates the provision that no person shall be deprived of life, liberty, or property without due process of law, the privilege of contracting being both a liberty and a property right.

Ramsey v. People, 142, 380 (1892). The act of June 10, 1891, which requires owners and operators of coal mines, when the miner is paid on the basis of the amount of coal mined and delivered by him, to weigh the coal on pit cars before it is screened, and to pay on such weights,

1896, secs. 2722-39; Missouri, Gen. Stats. 18. 1878, P. L. 67; Act June 13, 1883, 1889, secs. 7054-6; Act March 26, 1895, P. L. 113; Tennessee, Act of Term 1887, p. 229; New Mexico, Act Feb. 28, 1889, ch. 206, p. 336; Washington, Gen. Stats. p. 299; Ohio, Rev. Stats. 1890, sec. 305; 1891, secs. 2243-4; West Virginia, App. Pennsylvania, Act March 30, 1875, P. L. Code 1891, p. 999 *sq.*, para. 1-7. 38; Act June 1, 1883, P. L. 52; Act May

is in violation of the Constitution, as depriving a class of persons of the liberty and property right of making contracts without due process of law.

Braceville Coal Co. v. People, 147, 66 (1893). The act of April 23, 1891, prescribing that mining and certain other corporations shall make weekly payments to employees, is unconstitutional, as interfering with the liberty of contracting.

Harding v. People, 160, 459 (1896). The act in force July 1, 1887, as amended by the act in force July 1, 1891, providing for the weighing of coal at the mines, is unconstitutional. It is class legislation, and deprives the miner and the mine owner of the right of contracting.

Martin v. State, 143, 545 (1896). The act of March 2, Indiana.

1891, sec. 5, provides that all coal mined under contract for payment by quantity shall be weighed before being screened, and the full weight thereof credited to the miner; provided "that nothing in this act shall be so construed as to compel payment for sulphur, rock, slate, black jack, or other impurities, including dirt, which may be loaded with or amongst the coal."

The evidence in this case showed that these impurities could only be separated from the coal by screening, and it was therefore held not to be a violation of the act not to weigh before screening.

Beecher v. Dacey, 45, 92 (1881). A mercantile firm de-

Michigan. livered goods to the laborers of a mining company upon orders in the following form: "Due J. D. for labor from the M. & P. Rolling Mill Co., four dollars, in goods, at the store of E. H. Mead & Co., W. W. W., Treasr., by C. S. W. R.;" and on the delivery of goods to the amount called for, stamped each order "paid." It was apparently understood that M. & Co. should receive and honor the orders of the company, and that the latter should settle with them every month and pay the amount of the orders taken by them. The firm became insolvent, having among its assets a large number of these orders, upon which suits were brought against a stockholder of the corporation as for labor debts. *Held*, the action would not lie. The orders could not be treated as having been merely assigned to the firm by those in whose favor they were drawn; and the use of the words "for labor" in the orders was simply to indicate the nature of the service for which they were given, and not to keep them alive as against stockholders.

Berringer v. Cobb, 58, 557 (1885). A mining superintendent sued for wages, and his employers claimed as set off the rent of a house occupied by him. *Held*, that unless there was proof of a custom that the superintendent should have his house free of charge, the set off must be allowed. But it seems that plaintiff's evidence that he never heard of a superintendent's paying rent for his house was enough to leave the question with the jury.

State v. Loomis, 115, 307 (1893). Secs. 7058 and 7060,

Missouri. Rev. Stats. 1889, making it a misdemeanor for any corporation, person, or firm engaged in manufacturing or mining to issue in payment of wages of its laborers any order, check, memorandum, token or evidence of indebtedness, payable otherwise than in lawful money of the United States, unless the same is negotiable and redeemable at its par value in cash or in goods or supplies, at the option of the holder,

at the store or other place of business of the corporation, person or firm, is unconstitutional, in that it deprives the citizens of the liberty of contracting without due process of law.

Godcharles v. Wigeman, 113, 431 (1886). "The **Pennsylvania**. first, second, third and fourth sections of the act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States.

"He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void." Gordon, J.

Plymouth Co. v. Kommiskey, 116, 365 (1887). A custom that the owners of a mine shall pay the laborers employed by a contractor out of the funds due the contractor, upon the laborers' time being turned in by him, does not create any liability on the part of the mine owner to the laborers beyond the amount in his hands to the credit of the contractor, and none whatever if the time is not turned in. Whether this has been done or not is a question for the jury.

Fairfield v. Wyoming V. Coal Co., 142, 397 (1891). The employees of a coal company, mining coal for it with the assistance of laborers employed by them, "turned in" to the company monthly statements of the time made and wages earned by their laborers, and on its regular pay-days the company paid such wages directly to the laborers, out of the moneys in its hands due the miners who employed them.

Such being the established usage and method of conducting the business, the "turning in" of the laborer's time by the miner was in legal effect an order on the company to pay to the laborer the amount due him from the miner, and the acceptance thereof was an undertaking to pay at the regular pay-day. As the rights of a laborer, under such an order, are not superior to those of his employer, the miner cannot maintain an action for its amount against the coal company prior to the pay-day on which the moneys of the miner, out of which it is to be paid, become due, even though he may have quit the service of the miner nearly twenty days before such pay-day.

Humilton v. Jutte, 16 C. C. R. 193 (1895). An employee may waive his right under the act of May 20, 1891, to receive his wages in cash, and may validly consent to receive his pay in store orders. "No act of assembly can prevent a man from making a contract to accept payment in any way he pleases."

Commonwealth v. Isenberg, 4 Dist. Rep. 579 (1895). The semi-monthly pay law of May 20, 1891, P. L. 96, is unconstitutional. It infringes the following clauses of the Constitution: "No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

Art. I. sec. 17. "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." Art. I. sec. 1.

Commonwealth v. Hartzell, 5 Dist. Rep. 148 (1895). The third section of act of June 1, 1883, P. L. 52, providing penalties for weighing coal with an incorrect scale, is unconstitutional in that the subject of the section is not clearly expressed in the title, which is as follows: "An act to protect miners in the bituminous coal regions of this Commonwealth."

Sully v. Berwind-White C. M. Co., 5 Dist. Rep. 316 (1896). The plaintiff was employed by the defendant in its business of mining coal, and his wages were paid him under an arrangement with a general store kept in the vicinity of the mine, which furnished the plaintiff, from time to time, with provisions for himself and family, and, at plaintiff's request, presented the bills for the same to the defendant, which, at plaintiff's request, paid the same, and deducted the amounts paid from the wages due him. *Held*, that this was a valid payment by the defendant, and not contrary to any constitutional interpretation of the provisions of the act of May 20, 1891.

If the act of May 20, 1891, was intended to prevent persons competent to contract from making such contracts as they deem mutually advantageous, and which are not harmful in themselves or in conflict with the rights of others, it violates the Constitution.

Tennessee. Smith v. State, 90, 575 (1891). Indictment of weighman under act of 1887, ch. 206, for knowingly and wilfully taking more pounds for a bushel and more pounds for a ton than provided by law. The proofs showed that the cars were run upon scales, and if under twenty-five hundred pounds, they were weighed, but if over, they were not weighed, and the miner was credited with twenty-five hundred pounds. The defence set up was that this was in accordance with a contract which was entered into between the miners and the company in 1888, and which had been signed by many of the miners. This manner of weighing had been in force a number of years, and must have been known to the prosecutor. He had not agreed to the system. *Held*, not a good defence.

State v. Jenkins, 90, 580 (1891). The threatening by a mine owner that if the miners do not discharge the check weighman employed by them, he would shut down the mine, is not interfering with or intimidating the check weighman, within the act of 1887, ch. 206.

West Virginia. State v. Goodwill, 33, 179 (1889). Sec. 3, Acts 1887, ch. 3, which prohibits persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper except such as is specified in the act, is unconstitutional. It abridges the liberty of contracting; it restricts the privileges of certain classes, and not of others. It is not a valid exercise of the police power.

State v. Fire Creek Coal & Coke Co., 33, 188 (1889). Sec. 4, ch. 63, Acts 1887, which prohibits persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies, from selling merchandise and supplies to their employees at a greater per

cent of profit than to others not employed by them, is unconstitutional. It is class legislation, and an interference with liberty of contracting.

State v. Peel Splint Coal Co., 36, 802 (1892). The Scrip Act of March 7, 1891, ch. 76, and the Screening Act of March 9, 1891, ch. 82, do not conflict with either the Constitution of the State or the Constitution of the United States.

B. *Lien and Preference.*

These are provided by statute in those States where mining is an important industry. In some States special remedies are given to the miner, in others he is given the same rights and remedies as other mechanics, but is specially mentioned in the General Statutes. In all other States he can only obtain a preference or lien by bringing himself within the meaning of the general terms of the statutes creating liens and preferences in favor of laborers and the like.¹

Alabama. *Central Trust Co. v. Sheffield & B. C. I. & R. Co.*, 42 Fed. 106 (1890), C. C. N. D. Ala. A coal mine is an improvement on land, and coal cars used therein are material within Code 1886, 3018, giving a lien to every mechanic or other person doing work or furnishing "any material, fixtures, engines, boiler, or machinery for any building or improvement on land."

"A going coal mine is not merely a hole in the ground. It is made up of shafts, drifts, slopes, engines, machinery, platforms, cars, tracks, scales, etc., and taken as a thing, if not a building, it is unquestionably an improvement, and an improvement on land."

Arizona. *Eaman v. Bashford*, 37 Pac. 24 (1894). Defendant made a contract with M., by which M. was to operate defendant's mine and make certain improvements on it, with the privilege of buying it. A certain portion of the proceeds was to be paid to the defendant, and credited on the purchase price in case M. bought the

¹ Arizona, Rev. Stats. 1887, 2276-80; New York, Laws 1896, ch. 738, p. 728; California, Code Civ. Proc. 1183, 1204, North Dakota, Rev. Codes 1895, secs. 1206; Act March 9, 1893, pp. 87, 97; 4805-12; Ohio, Act April 13, 1894, 91 O. Colorado, M. A. S. 2875; Laws 1895, p. 202, L. 135; Oregon, Hill's Ann. Laws 1892, sec. M. A. S. Supp. 2873; Dakota, Comp. L. 3834; Act Feb. 20, 1891; Pennsylvania, 1887, ch. 19, art. 1, secs. 2039-46; Idaho, Acts April 9, 1872, P. L. 47; May 8, 1874, Rev. Stats. 1887, secs. 5125-39; Act Feb. P. L. 120; June, 1883, P. L. 116; June 3, 27. 1893, p. 49; Act March 7, 1895, p. 48; 1887, P. L. 337; May 12, 1891, P. L. 54; Illinois, Hurd's Rev. Stats. 1895, ch. 93, South Dakota, Laws 1895, ch. 134, p. 154; sec. 4; Indiana, Horner's Rev. Stats. 1896, Utah, Act March 8, 1894, ch. 41; Virginia, sec. 5471; Iowa, Laws 1890, ch. 47, sec. 1, Code 1887, secs. 2485, 2486; Act Feb. 12, p. 72; Kentucky, Barb. & Car. Stats. 1894, 1896, p. 340; Washington, Gen. Stats. 1891, sec. 2487; Michigan, 2 How. Ann. Stat., secs. 1663-77; Wisconsin, Ann. Stats. sec. 8408; 1 ibid. 4110; Montana, Code 1889, sec. 3342, p. 1864; Wyoming, Rev. Civ. Proc. 1895, secs. 2130 sq., 2150 sq.; Stats. 1887, secs. 1486-1505, ch. 2; Act Nevada, Gen. Stats. 1885, sec. 3808; New March 1, 1897, chs. 62 and 64. Mexico, Comp. Laws 1884, secs. 1519-35;

mine. If he did not buy, the payments and improvements were to be forfeited. M. failed to buy, and turned the mine and improvements over to the defendant. *Held*, M. was defendant's "agent" within Rev. Stats. 2276, 2278, 2280, giving laborers and material-men a lien on mines for labor or materials furnished to the owner or agent thereof.

Gardner v. Resumption M. & S. Co., 35 Pac. 674 (1894). Gen. Stats. 1883, Lien Act, sec. 7, as amended by Laws 1889, giving to persons who do work on mining property operated by lessees a lien for their labor, unless the owner files for record "before the commencement of work under the lease" a notice that the property is being worked under a lease, does not apply when the lease was executed and the work performed before the passage of the act.

California. *Dickenson v. Boyer*, 55, 285 (1880). Where work has been performed on a dwelling house situate upon a certain mining claim, and upon a tunnel and other portions of the same claim, the laborer may file a mechanic's lien for the amount due. Section 1188 of the Code of Civil Procedure, requiring the apportionment of liens, does not apply to a case such as this where "all the work was performed upon one and the same piece of property, although upon different portions of it," but only to cases in which one claim is filed against two or more separate and distinct "buildings, mining claims, or other improvements owned by the same persons."

Hlm v. Chapman, 66, 291 (1885). A mine or pit sunk within a mining claim is a structure within the meaning of the mechanics' lien law (Code Civ. Proc. 1185).

One who performs labor in any pit, shaft, or galley of a mine is entitled to a lien upon the whole claim.

Palmer v. Uncus M. Co., 70, 614 (1886). One performing manual labor in and upon a mine is entitled to a lien therefor, though called the superintendent of the mine.

Tredinnick v. Red Cloud Con. M. Co., 72, 78 (1887). A description of the property as "that certain mine commonly called the Red Cloud Mine, situated in the Bodie mining district, in B. township, M. Co.," is sufficient to identify it when it appears from the evidence that the mine was well known and commonly spoken of as the "Red Cloud Mine," and that the word "mine" meant the whole claim or body of mining ground. Errors in the description by courses and distances therefore became unimportant.

Sec. 1188, Code Civ. Proc., does not apply to a case where the property originally consisted of several claims which had been consolidated, and were owned and worked as one mine by the person against whom the lien was filed.

Milone v. Big Flat Gravel M. Co., 76, 578 (1888). Tools and machinery used in the development of the mines are, while so used, to be considered affixed to the mine (Civ. Code, 661), and work upon such tools and machinery is work upon the mine, and as such may be the subject of a lien. Consequently a blacksmith who sharpened picks and drills, made pipe, and did other necessary work on the claim, is entitled to a lien.

Beirick v. Muir, 83, 368 (1890). "Mining claim" in the mechanics' lien act includes all mines, whether the title thereto is inchoate or perfect. It covers a claim after a patent has been issued therefor.

Silvester v. Coe Quartz M. Co., 80, 510 (1889). "The lien given by the statute is upon the mining claim as a whole, and not upon the separate parts of work done in its repair (Code Civ. Proc., sec. 1188). The mine is a structure within the meaning of the statute (*Helm v. Chapman*, 66 Cal. 291). The work done in this case became and was a part of the mining claim, and the whole claim, including the added improvements, was subject to the lien (Civ. Code, 661)."

Williams v. Mountaineer G. M. Co., 102, 184 (1894). A claim for a lien for materials furnished for the construction of a mill, tramway, boarding house, and reduction works upon a mining claim should be against the mining claim, and not against the specific structure upon the mine. Code of Civ. Proc., sec. 1188. "The Code does not seem to have provided for all the cases which may arise in regard to liens upon mining claims. We can only follow the procedure as far as applicable. For that purpose the mining claim must stand in the place of the structure as the property to be charged with the lien."

Morse v. De Ardo, 107, 622 (1895). Sec. 1183, Code Civ. Proc., does not give a lien for wages of laborers employed in working a mine or land held under an agricultural patent. A mining claim is ground the title to which, or the right of possession of which, has been acquired under the mining laws.

Fernandez v. Burleson, 110, 164 (1895). Case of insufficient description of claim.

Barnard v. McKenzie, 4, 251 (1878). Hauling ores **Colorado.** from a mine to a quartz mill is not work "in or upon any mine, lode, or deposit," within the mechanics' lien act of 1872.

Keystone M. Co. v. Gallagher, 5, 23 (1879). A lien may be had for furnishing materials for and building a house or shop contiguous to a mine for the use of the mine, which is owned by the owners of the mine, and is a part of the mining property. This house may also be sold with the mine for the purpose of enforcing the lien. Powder, steel, and candles for use in the mine are within the clause "timber or other material to be used in the mine," as used in the statute to describe the articles for which a lien may be filed.

Rara Avis G. & S. M. Co. v. Bouscher, 9, 385 (1886). Section 4 of "An act to secure liens to mechanics and others" provided "all miners, laborers, and others who work or labor to the amount of \$25 or more, in or upon any mine, lode, or deposit . . . shall have, and may each respectively claim and hold, a lien;" and section 1: "All artisans, mechanics, and others who shall perform work or labor . . . for the construction or repair of any building or other superstructure shall have, and may claim and hold, a lien." Plaintiff's services in planning and superintending development work upon the mines and in planning and supervising the erection of a mill and machinery are work and labor in and upon the property within the meaning of the statute.

Rico R. & M. Co. v. Musgrave, 14, 79 (1890). To entitle a party to a miner's lien, there must be a contract, express or implied, with the owner of the property on which the lien is claimed. The burden of proving such contract rests on the party asserting it, and he must ascertain for himself whether the person with whom he contracts is the owner, or has an interest in the land on which he expects to

claim a lien. It is sufficient if the contract be with the authorized agent of the owner. But if it be with one of several co-tenants, the lien will be confined to his interest.

Hopkins v. Hudson, 107, 190 (1886). Sec. 5471, Rev. Indiana. Stats. 1881, providing that miners and other persons employed and working in and about mines shall have a lien on the said mine, and the machinery, etc., connected therewith, applies only to the interest or estate of the persons operating the mine. It does not bind the estate of a lessor.

Warren v. Sohn, 112, 213 (1887). Sec. 5471, Rev. Stats. 1881, giving miners and other persons employed in and about coal mines a lien for work and labor done, and land owners a lien for royalties, which liens are prior to the lien of a mortgage, is constitutional.

Shull v. Fontanet M. Assn., 128, 331 (1890). The cost and expenses, including wages of a laborer that he employed, incurred by the assignee of a mining property, are made by statute a preferred claim and lien on the assigned property prior to all other claims, even to those for labor incurred before the assignment.

Miller v. Cumberland Cotton Factory, 26, 478 (1866). Maryland. Upon a proper construction of the several sections of the act of 1847, ch. 228, entitled "An act for the protection of miners, mechanics, laborers, and others employed in mines and manufactories in the county of Allegany, and for other purposes," and considering the said several sections collectively, it is apparent that the creditors entitled to a lien under the said act must not only be of the particular classes enumerated in the act, but that they must also have a residence for the time being in Allegany County.

Hicks v. Consolidation Coal Co., 77, 86 (1893). The act of 1847, ch. 28, declared that if any person engaged in mining or manufacturing in Allegany County should for ninety days fail to pay wages as they became due to employees, or to pay the furnisher or furnishers of any ore, clay, coal, or any other raw material generally used in manufacturing establishments, they should become liable to a receivership if the indebtedness amounted to \$500. It was made the duty of the receiver to convert the personal property and pay these claims *pro rata*, it being enacted that no mortgage or other lien should be prior thereto except mechanics' liens. The act of 1852, ch. 229 reduced the period of default to thirty days. The Code of 1860 extended the act to raw materials of every description and reduced the necessary indebtedness to \$25. The act of 1878, ch. 320, re-enacted the law, extending it to every trade or business in Allegany County.

Held, that the benefits of the law were not confined to such raw materials as became incorporated in the course of manufacture with the products evolved, but made the claims absolute and payable out of all the personal property of the debtor. The claim here sustained was for coal.

McLaren v. Byrnes, 80, 275 (1890). How. Stats. 8408, Michigan. giving a lien to laborers for mining corporations, applies to the personal labor performed by an overseer and custodian of the mines and property of the corporation, while in charge thereof. This lien accrues and attaches to the property as the labor is performed, and all

persons are bound to take notice of this fact. It may be lost by laches, but not otherwise, unless by payment or satisfaction, or voluntary release or waiver. It will, therefore, take precedence of an attachment levied after the labor was done but before the lien was filed.

Missouri. *Granby Mining & Smelting Co. v. Turley*, 61, 375 (1875). By an agreement between the owner of land and certain miners, certain lots were set apart to the latter, who agreed to dig the mineral therefrom and deliver it to the former, who was to pay a certain compensation therefor. It was provided that the miners should deliver the ore to no other persons, nor permit other persons to take it; also that no right, title, or interest of, in, or to any lands, ores, or minerals was conveyed, and that all ores or minerals, whether in the ground or severed therefrom, should remain the property of the owner of the land, and the compensation paid the miners be considered not as the price of the minerals, but compensation for labor and services rendered. *Held*, the miners had a lien upon ore dug by them, and the right of possession until the compensation was paid or tendered. But they had no title and could not sell, and a purchaser with notice of the facts could take no title as against the land owner.

Meistrell v. Reach, 56 Ap. 243 (1894). Boiler, pump, engine, and machinery not situated in or in any way connected with any building or improvement, but simply placed and used at a mining shaft in drawing therefrom coal and water, are not subject to a mechanic's lien.

"Building" and "improvement" are used in the statute as synonymous terms.

Springfield Foundry & Mach. Co. v. Cole,¹ 130, 1 (1895). Persons mining for zinc or lead ore on the land of another, subject to the printed statement of the terms, conditions and requirements imposed by the owner, as provided for in Rev. Stats. 1889, sec. 7034, have no estate or interest in the land, or in any of the ore, until it is mined. They are licensees. Machinery placed by them in a building on the land, for use in their mining operations, does not become part of the land, and as such subject to a mechanic's lien. It is a trade fixture.

Montana. *Smallhouse v. Kentucky & Montana G. & S. M. Co.*, 2, 443 (1876). The superintendent of a mining company, having general charge of its mines and works and the erection of its buildings, employed at a fixed salary, is not entitled to a lien under an act giving such to mechanics, builders, lumbermen, artisans, workmen, and laborers who shall perform work and labor upon any building, erection, mining claim, quartz lode, etc.

Davis v. Alvord, 94 U. S. 545 (1876). Appeal from Supreme Court of Montana. Work was done by the plaintiff, under a contract with the defendant made Aug. 1, 1869, on two distinct parcels of property situated in Montana Territory, — one a quartz mill and the other a quartz mine, separated a considerable distance from each other. The work on the mill was completed in the fall of 1869 or in the summer of 1870. Nothing was done afterwards, except to make occasional repairs as they were needed. The work on the mine was done in 1870, but it was not shown when the work was commenced. In June, 1871, upon an accounting between the plaintiff and the defendant, there was found due the

¹ Overruling *Buchanan v. Cole*, 57 Mo. Ap. 11.

plaintiff a large sum, which the parties agreed should be a lien upon the mill and mine in equal proportions. Notices claiming a lien upon each for the amounts thus apportioned were accordingly filed in the recorder's office. *Held*: 1st, that a lien did not arise from this contract of apportionment, or from the special contract under which the work was done, but from the work itself, which was performed upon the property; 2d, that the work being done on different parcels of property, the lien claimed on one was to be considered separately from the lien claimed on the other; 3d, that the notice, so far as the mill was concerned, was filed too late, the statute requiring the notice to be filed within sixty days after the completion of the work, and the occasional repairs subsequently made could not be added to the work done months before, so as to render the whole work one continued performance, for which a single lien could be claimed within sixty days after the last repairs; 4th, that it not appearing when the work upon the mine was commenced in 1870, it will not be presumed that it was commenced before the mortgage of the defendant was executed and recorded in September of that year, so as to give to the lien for the work priority over the mortgage.

Pelton v. Minah Con. M. Co., 11, 281 (1891). By a contract between defendant and S., the latter was to work the mine of the former for a year, to make certain repairs, sink a certain shaft, run levels of stated dimensions and distances, and from over said levels to stope so much of the ore as he desired, the ore so mined to be concentrated and delivered at S.'s expense on board of cars, and the defendant was to ship the same. It was also provided that S. should "have, as full compensation for sinking said shaft, running levels, stoping the ore, furnishing the lumber, and hauling and delivering the ore on the cars, eighty per cent of the net returns as paid for said ore;" that if S. should fail to keep the mine in operation for five days in any one month, defendant might, at its option, consider the contract abandoned; and that S. should on the 15th of each month discharge every liability incurred against the mine by him during the month. This was *held* to be a lease, and an employee of S. had not a lien for labor upon the mine.

Smith v. Sherman M. Co., 31 Pac. 72 (1892). A statement showing the performance of work on a mining claim at a certain rate, for so many days between certain dates, and amounting in all to a fixed certain sum, no part of which has been paid, is sufficient to support a mechanic's lien under Comp. Stats., div. 5, sec. 1371.

The act of the first legislative assembly restricting a mechanic's lien to one acre of the land on which any building, structure, or improvement was situated, if outside of any town, did not apply to work done upon a mining claim; but Comp. Stats., div. 5, sec. 1370, supplied the omission as to such a claim, and without any restriction as to extent. The description, therefore, required by section 1371 need not contain a designation of boundaries, if the property may be identified merely by name.

Block v. Murray, 31 Pac. 550 (1892). If the owner of a mine grants to another the possession, the right of possession, and the control thereof for a limited period, with the privilege to purchase at a fixed price at any time within the period, and also with privilege to extract ores

without limit, providing, however, some conditions as to sinking shafts, running levels, the manner of timbering, etc., all to be done, at the grantee's expense, reserving to the grantor a certain percentage of the net profits to be applied to the purchase if that option is exercised, otherwise to be retained by the grantor, and no provision is made for any payment by the owner, and there is no obligation on the part of the grantee to do the work, except that implied by the provision that failure should work a forfeiture,—the grantee is a tenant within the meaning of the act of March 9, 1887, sec. 315, p. 17. The provision requiring a shaft to be sunk a certain depth, and timbered as designated, does not render the grantee a contractor. He was not bound to sink the shaft, etc., though failure worked a forfeiture; and the owner paid no consideration therefor. "The law allows a lessor to impose conditions as to the manner in which the leased premises shall be used and worked, and we would not be justified in holding that because the owners provided in a measure such conditions, therefore the interests of the owners became subject to a lien for labor and materials procured by the lessee in his operations on the mine in question, while the statute excepts such interests from such lien."

Hunter v. Savage C. S. M. Co., 4, 158 (1868). The act Nevada. of Feb. 6, 1867, did not give a lien for labor done before its passage.

Where a judgment of lien was rendered against a mining claim for work done partly before and partly after the passage of the act, it was modified so as to allow a lien only for work done after the passage of the act, the amount of which should be ascertained by the lower court. The first day's labor for which a lien could attach was the day after the passage of the act.

In re Hope Min. Co., 1 Sawy. 710 (1871). D. C. D. Nev. Hauling quartz to a quartz mill gives the teamster a lien under an act providing that "all persons performing labor for carrying on any mill shall have a lien on such mill for such work or labor done."

Skyrme v. Occidental M. & M. Co., 8, 219 (1873). Where sundry lien claimants filed a joint lien, and afterward filed their several liens, as they should have done in the first instance: *held*, that they could treat the first filing as a nullity.

Work was done by many miners by the day, under the direction of the foreman, alternating with small contracts with sundry parties among the miners for running a few feet, at so much a foot. *Held*, that it was one continuous transaction, to be protected by a single claim for lien on behalf of each miner. "The manner in which the work was conducted in the Occidental Mine is quite common in many of the mines in this State. In the prosecution of the work it is necessary to run tunnels and cross-cuts and sink winzes; and while as a general rule the laborers are employed by the day, it is often the case that some of them will take a contract to do this kind of work at a stipulated price per foot, and within a few days after their contracts are completed, either to go to work by the day or take other contracts in the same mine. It would be a harsh and unreasonable rule of construction in these cases to hold that the statute required separate liens to be filed for each contract to enable the laborer to secure his wages. The injustice of such a rule

would be greater to the mine owner than the laborer. It would destroy the credit necessary at times to have in order to continue operations on the mine, or add unnecessary costs and litigation by filing and foreclosing a multiplicity of liens."

Capron v. Strout, 11, 804 (1876). The foreman of a mine is entitled to a lien. "He certainly did work in the mine, though not with his hands, and it is clear that the direct tendency of his work was to develop the property. We think the foreman of work in the mine is as fully secured by the law as the miners who work under his direction."

Under the provision in a statute that mechanics' liens shall be preferred to every other lien or incumbrance which shall attach subsequent to the time when the work or labor was commenced, where a miner was hired for a month, and continues from month to month, his lien is subsequent to an intervening mortgage from the end of the current month during which the mortgage was recorded.

New Jersey. *Trust Co. v. Quarry Co.*, 31 Eq. 89 (1879). After a decree in foreclosure and execution issued against an insolvent corporation, it quarried certain stone on the mortgaged premises, which stone still remained on the ground. *Held*, as between mortgagor and mortgagee, such stone was subject to the mortgage. But under the circumstances of the case, it was subject to the prior lien under the statute for quarrymen's wages.

Oregon. *Williams v. Toledo Coal Co.*, 25, 426 (1894). The lien given by the act of Feb. 20, 1891 (Laws, 1891, p. 76), applies to claims on which minerals have not yet been found, as well as to those which are productive.

The lien given by this act does not include labor done on a wagon road, not constituting an incline or excavation, since when liens are given for specified classes of work other classes are impliedly excluded.

Honeyman v. Thomas, 25, 539 (1894). A derrick erected by a tenant in a quarry by placing a post upright in a socket upon the ground is a trade fixture, and not subject to a mechanic's lien.

Pennsylvania. *Reed's Ap.*, 18, 235 (1852). The statutory preference given to miners wages in the distribution of the proceeds of a sheriff's sale, is not limited to the proceeds of personal property at the mines, but extends to the personal estate generally of their employers.

Betty's Ap., 3 Grant, 213 (1857). Under the act of April 2, 1849, sec. 3, miners' wages are a preferred debt. But when a partnership is the debtor, a judicial sale of the separate interest of one of the partners does not entitle the miners to preferred payment out of the money so made.

Wood's Ap., 30, 274 (1858). In the distribution of the proceeds of a sheriff's sale of a lease of coal mines, and of personal property on the leased premises, the landlord's claim for one year's arrears of rent has, under the statutes, a priority over the claims of miners and laborers' claims.

Castor v. McShaffery, 48, 437 (1865). One hired to take stone out of the quarry of a third person by a contractor to furnish stone to a turnpike company, has no such property in stones quarried by him after his employer has abandoned the contract, as will enable him after

leaving to maintain trover for the same against the agent of the company. He is without title, possession, or lien.

Esterly's Ap., 54, 192 (1867). A railroad down a slope of the interior of a mine is not an improvement or fixture within the mechanics' lien law of Feb. 17, 1858, which creates such a lien on all "improvements, engines, pumps, machinery, screws, and fixtures erected by tenants of leased estates." "Improvements" in the act does not apply to temporary and insignificant additions, but to such permanent and substantial erections as essentially augment the interest which the tenant has in the land.

Vandergrift's Ap., 83, 126 (1876). One who contracts to drill an oil well, furnishing tools, ropes, and fuel for the same for a certain sum, is entitled to a mechanic's lien under the act of March 7, 1878, sec. 2, which provides that "All persons doing work for, on, or about the erection, construction, or repair of any engine, etc., upon any leasehold estate, or for boring, drilling, or mining on said lease or lot for the improvement or development of the same," shall have a lien on personal property and fixtures.

Taylor v. Smith, 1 Chester Co., 106 (1877). Men employed to dig a mineral from the surface of the earth are miners, within the act of April 9, 1872, making wages of certain employees preferred claims.

Where, however, the time occupied in mining cannot be separated from that employed in farm work, no preference can be allowed.

Willauer's Ap., 1 Chester Co., 533 (1882). In the distribution of the proceeds of the sale of a piece of real estate upon which was a kaolin mine, a preference was claimed by one whose duties were to solicit and obtain orders for clay, upon which he received a commission; he also performed other occasional services, but his claim was for commissions under his contract. He was not entitled to a preference. "He was not a miner or mechanic; neither was he a clerk or laborer within the meaning of the act" (of April 9, 1872).

Shainline's Ap., 2 Walker, 325 (1883). Building stones are minerals; and laborers in a quarry are miners within the acts of 1872 and 1878, giving preference to miners for wages. They likewise have this preference under the act of 1883.

Periepi v. Frankenfield, 1 Lancaster Law Review, 181 (1884). Laborers engaged in quarrying stones are miners. They are entitled to have their wages preferred in the distribution of the proceeds of a sheriff's sale, under the act of June 13, 1883.

Flagstaff S. Min. Co. v. Cullins, 104 U. S. 176 (1881), **Utah.** affirming *Cullins v. Flagstaff S. Min. Co.*, 2 Utah, 219. The agent of a mining company employed the plaintiff, for an indefinite time, to direct the work in its mine, with authority to employ and discharge miners, and procure and purchase supplies for working the mine. It was his duty to plan, oversee, and direct the work in the mine, direct the shipping of ore, and generally to control and direct the actual working and development of the mine. In the course of these duties he did some manual labor. "He was not the general agent of the mining business of the plaintiff in error. That office was filled by Patrick. He was not a contractor. The services rendered by him were not of a professional character, such as those of a

mining engineer. He was the overseer and foreman of the body of miners who performed the manual labor upon the mine. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. He appears, from the findings, to have performed duties similar to those required of the foreman of a gang of track hands upon a railroad, or a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house.

"Their performance may well be called work and labor; they require the personal attention and supervision of the foreman; and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. Such duties cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under the control of the foreman, is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of such duties may well be called work and labor, and that the District Court rightfully declared the person who performed them entitled to a lien, under the law of the Territory."

II. HEALTH AND SAFETY OF MINERS.

In all those States where mining is an important industry, statutes have been enacted providing, in greater or less detail, measures looking to the protection of the lives and health of those engaged in the hazardous employment of mining.¹

¹ United States, Act March 3, 1891, 1 Supp. Rev. Stats. 948; Alabama, Act Feb. 16, 1893, Sess. Laws, 607; Act Feb. 18, 1895, Sess. Laws, 1230; California, Act March 13, 1872, p. 413; Act March 27, 1874, p. 726; Colorado, M. A. S. 3181-3221; Idaho, Act March 6, 1893, p. 152; Act March 11, 1895, p. 160; Illinois, Hurd's Rev. Stats. 1895, ch. 93; 2 Starr & Curtis Ann. Stats. ch. 93; Constn. sec. 29, art. 4; Indiana, Horner's Rev. Stats. 1896, secs. 5458-80 y, 7473-81; Iowa, Rev. Code 1888, tit. xi., ch. 8, secs. 7-19, p. 588; Laws 1890, ch. 46, secs. 1, 2, p. 71; Kansas, Gen. Stats. 1889, secs. 3830, 3832, 3846-61, 3864-7; Act March 10, 1891, p. 270; Act March 2, 1895, p. 312; Kentucky, Barb. & Car. Stats. 1894, secs. 2722-39; Michigan, 3 How. Ann. Stats. sec. 2287; Missouri, Gen. Stats. 1889, sects. 7061-77; Acts April 23, 1891, p. 182, April 18, 1893, p. 209, April 9, 1895, p. 225, April 11, 1895, p. 226, March 18, 1895, p. 227, April 3, 1895, p. 228; Montana, Pol. Code 1895, secs. 580-90, 3650-54; Crim. Code 1895, secs. 474, 704, 705, 708, 722; Acts March 1, 1897, pp. 66, 245; Act March 4, 1897, p. 109; Nevada, Gen. Stats. 1885, secs. 290-98; New Mexico, Comp. Laws, 1884, secs. 1575-85; New York, Laws 1883, ch. 356; Laws 1890, ch. 394; Laws 1892, ch. 667; Laws 1893, ch. 359; Laws 1895, chs. 324, 670, 765; Ohio, Rev. Stats. 1890, secs. 290-306, 6871 sq.; 88 O. L. 396; 89 O. L. 164, 377; 91 O. L. 160; Pennsylvania, Acts June 30, 1885, P. L. 202, May 9, 1889, P. L. 154, June 2, 1891, P. L. 176, May 15, 1893, P. L. 52, July 15, 1897; South Dakota, Act March 1, 1890, ch. 112, p. 263; Tennessee, Act 1881, ch. 170; Code 1884, secs. 306-7; Utah, Act March 10, 1892, chs. 38, 41; Act April 5, 1896, ch. 113; Washington, Gen. Stats. 1891, secs. 2217-40, 2263-71; Act March 6, 1897, ch. 45, p. 58; West Virginia, App. to Code 1891, pp. 991-8, pars. 1-18; Wisconsin, 1 Laws 1891, ch. 109, p. 126; Wyoming, Laws 1888, ch. 40, sec. 12; Laws 1890, ch. 80.

As the decided cases upon this subject involve no general principle, but are concerned only with questions of construction, a general discussion of them is impossible. The cases themselves are collected below in the arrangement by States adopted in this work.

The question of the constitutionality of these statutes has been decided affirmatively in a Pennsylvania case.

Illinois. *Daniels v. Hilgard*, 77, 640 (1875). The legislature has power, under the Constitution, to establish reasonable police regulations for the operating of mines and collieries, and the "act providing for the health and safety of persons employed in coal mines," which requires the owner or agent of every coal mine or colliery employing ten men, or more, to make or cause to be made an accurate map or plan of the workings of such coal mine or colliery, is not unconstitutional. Under section 2 of this act the inspector of mines may, on default of the owner or agent, prepare such a map through his deputy, and may recover the cost thereof in an action in his own name. It is no defence to such an action that the map is not such as the law requires.

Sholl v. People, 93, 129 (1879). Under sec. 9, ch. 93, Rev. Stats. 1874, as amended by act May 11, 1877, the person whose duty it is made to report any accident in any mine causing loss of life or serious personal injury to the mine inspector is the one who has the immediate charge of the mine. The owner and operator, or his agent, is not subject to the penalty, unless he has the personal charge of the mine.

Loose v. People, 11 Ap. 445 (1882). Act of May 28, 1879, requires that mines worked through a shaft, slope, or drift should have escapement shafts. The owner of a mine having no escapement shaft of its own had effected a communication with a contiguous mine, and contended that this was a compliance with the law. The adjoining owner denied his right to use this means of egress, and claimed the right to close it up. *Held*, this question could not be adjudicated in a proceeding against the foreman by the mine inspector, although he made the latter a party.

Hamilton v. State, 102, 367 (1882). The act of 1879, relating to the health and safety of persons employed in coal mines, repealed all of the act of 1877 on the same subject, except such parts as were kept in force by the proviso to section 3 of the former. By this the then existing law which prescribed the time within which escapement shafts should be constructed in mines that were in operation on July 1, 1877, was continued and was not altered.

Beaucoup Co. v. Cooper, 12 Ap. 373 (1883). The agent of a coal company who superintends the mining of coal, failed to put the brakes and catches on the cages, required by section 6 of the act of 1879, providing for the safety of persons employed in coal mines, and in consequence of such failure was killed. *Held*, his widow and heirs cannot recover damages from the owner of the mine for his death. It was as much the duty of the agent as of the owner, under the statute, to see

that brakes and catches were provided. By failing to do so they were *in pari delicto*.

Coal Run Coal Co. v. Jones, 19 Ap. 365 (1885). Secs. 4 and 6, ch. 93, Rev. Stats. 1874, as amended by act of June 21, 1883, requiring that "in all mines where fire damp is generated, every working place where fire damp is known to exist shall be examined every morning with a safety lamp, by a competent person, before any other persons are allowed to enter, applies not only to opened and worked mines, but also to a shaft in process of sinking preparatory to opening up and working a mine or stratum of coal.

Coal Run Coal Co. v. Jones, 127, 379 (1889). *Coal Co. v. Jones*, 19 Ap. 365, reversed, on ground that gas was not being generated at the "working place" when the accident occurred.

Sungamon U. M. Co. v. Wiggerhaus, 122, 279 (1887), affirming s. c. 25 Ap. 77 (1886). Sec. 8, ch. 93, Rev. Stats., requiring "all underground, self acting or engine planes or gangways on which coal cars are drawn and persons travel" to be provided with signals, applies to all underground gangways on which coal cars are run, whatever the motive power may be.

Springside Coal M. Co. v. Grogan, 53 Ap. 60 (1892). Ch. 93, Rev. Stats., applies only to coal mines. A pit which is being dug and which, when completed, is to be used as a shaft of a coal mine which it is designed to open, is not a coal mine within the meaning of the statute.

Pennsylvania. *Commonwealth v. Bonnell*, 8 Phila. 534 (1871).

In cutting the second opening required by the third section of the act of March 3, 1870, the production of coal for market by the men authorized to be employed for the purpose of cutting the said opening is not permitted by the act, except so far as it is incident to driving on through a seam or stratum towards a second outlet.

Commonwealth v. Tompkins, 1 L. L. R. 341 (1872); s. c. 4 Legal Gazette, 238. A mine is not free from danger within the meaning of the act of March 3, 1870, when gas actually exists within the mine, simply because its source is beyond the boundary lines thereof. The act deals with its presence, not its origin.

The act does not require that the mine be kept absolutely clear of gas, but that by the introduction of pure air the gas, as fast as evolved, be diluted, rendered harmless and expelled, so as to avoid its accumulation as standing gas.

Commonwealth v. Connell, 2 L. L. R. 1 (1872). The act of March 3, 1870, by its terms, applies to mines "worked by or through a shaft or slope." It consequently does not apply to a mine worked through a tunnel.

Commonwealth v. Wilkesbarre Coal Co., 29 Leg. Int. 213 (1872); *Commonwealth v. Bonnell* followed. A slope had been driven in a seam or stratum of coal which was in communication with a second outlet at the point where the mining was carried on, and a field of coal there had been exhausted. From that point a slope was continued, following the pitch of the seam down several hundred feet, and at the bottom thereof extensive mining was carried on, but there was no second outlet communicating therewith. The mine is within the legis-

lative inhibition, and an injunction will be granted to restrain the owners from thus working it.

Northumberland County v. Zimmerman, 75, 26 (1873). The act of April 12, 1867, "for the better protection of person, property, and life in the mining regions of this Commonwealth," so far as it provides for the appointment by the Governor of police officers to preserve the peace, and for their payment at the rate of compensation fixed by the Governor, out of the county treasury, is constitutional, and an officer appointed thereunder may recover his compensation from the county.

Commonwealth v. Reynolds, 1 Kulp, 218 (1886). Under the law of 1870 a mining boss has no discretion in the performance of his duties. His opinion that an appliance required by the act is unnecessary does not excuse his neglect to have it provided. He cannot delegate his powers and duties.

Whether a door is a main or "check" door within the meaning of the act is a question of fact.

Haddock v. Commonwealth, 103, 243 (1883). Section 3 of the act of March 3, 1870, does not prohibit the mining of coal for market in those seams of a coal mine which have two openings or outlets, as required by the act, at the same time that work is being carried on by not more than twenty men in another seam, for the purpose of making a gangway from said last mentioned seam to a second opening or outlet. A coal mine containing five strata or seams of coal was operated through a shaft extending from the surface through the various seams of coal, and the entrance to the shaft was covered by the breaker. In the first and third seams fifty or more miners were employed, mining coal for market. The second and fourth seams were not being worked. In the fifth seam a number of miners, not exceeding twenty, were engaged in working a gangway to connect with a second opening which had been completed to that seam, although said opening or outlet was already connected with the first and third seams, in accordance with the requirements of the act.

Under sections 3 and 5 of said act the inspector of mines filed a bill in equity to restrain the working of the first and third seams, at the same time that work was being carried on to make a second opening or outlet in the fifth seam. A demurrer to said bill was overruled by the court below, and the injunction granted. *Held*, to be error, and that under the proviso to said third section the work might be carried on as above stated.

Commonwealth v. Coonrad, 3 Kulp, 381 (1885); s. c. 14 L. L. R. 311. Under the act of June 30, 1885, if by reason of noxious gases, or any cause whatever, an anthracite mine has become dangerous, it is the duty of the "mine foreman" (mining boss) to compel all workmen to retire from the mine until a proper examination of its condition has been made. Failure to do this is a disobedience of the law. It was such disobedience to allow men to remain in and enter the mine after the ventilating apparatus, by reason of a break, ceased to work, and the fires under the boilers were still kept up, the mine being one which was dependent upon artificial means for ventilation. The foreman should have been acquainted with the danger.

Commonwealth v. Richmond, 2 Com. Pleas Rep. 189 (1885). In

order to convict a mine superintendent of a criminal offence under the act of June 30, 1885, art. xi., secs. 1-3, and art. xvii., sec. 4, for not furnishing props, it must be shown that a specific demand had been made at least one day in advance, giving the length of the props or timber required. A general demand by a committee of workmen, and a refusal generally to cut and prepare, is not sufficient. This prosecution arose out of a dispute as to whose duty it was to cut the props of the proper length. The court said it was the duty of the operator to cut props into proper length, and to take them into the chambers to the men employed in the mines, and deliver them there, leaving to the men the duty only to set them up.

Commonwealth v. Hutchison, 4 C. C. R. 18 (1887). If a vein of coal is known to generate explosive gases at any point, any mine on that vein will be considered "a mine generating explosive gases," under the act of June 30, 1885, providing for a daily inspection of such mines by the mine foreman. But if there is doubt whether the foreman knew that explosive gases had ever been generated in his mine, he should not be found guilty of violating the provisions of the act.

Under the provisions of that act it is the duty of the mine foreman to see that the ventilation required thereby is furnished. This duty cannot be delegated. Neglect to perform this duty is a violation of the act, and subjects the offender to its penalties. That the amount of ventilation required by the act is unnecessary, or difficult to supply, is no excuse. The foreman has no discretion as to the amount. That is fixed by the legislature.

Commonwealth v. Wigton, 12 C. C. R. 55; s. c. 2 Dist. Rep. 51 (1893). Under the provisions of the act of June 30, 1885, requiring "the owner or agent of every coal mine to employ a competent and practical inside overseer, to be called a mining boss," owners or agents of mines are not required to employ a certified mining boss for every working drift or opening, where the mine, although worked through one or more drifts, consists of territory compactly adjacent, and in its working constitutes but a single operation. Under this act, where the operations are so extensive that the mining boss cannot personally perform all his prescribed duties, he may employ assistants who are not "certified."

Opinion of Attorney-General, 14 C. C. R. 96 (1893). The powers of a mine inspector under the act of May 15, 1893, are purely statutory, are in derogation of the rights of employers and of private contract, and must be strictly construed.

He has power only to order workmen to cease work until the law is complied with, and to prevent them from working, or their employer from working them, in the meantime. So long as they are not working, the operator may abandon the mine; he cannot be compelled to comply with the act, and the reinstatement of the men is not within the inspector's control.

The act does not apply to a mine employing nine persons in any one period of twenty-four hours.

Commonwealth v. Vipond, 14 C. C. R. 357 (1893). Where a colliery was erected prior to the passage of the act of June 2, 1891, and is destroyed by fire, leaving foundations and boilers standing intact,

the breaker may be erected on the old foundation and the boilers maintained as they formerly existed, though less than one hundred feet from the breaker. See art. v., sec. 2, of said act.

Mine inspection. Appointment of foremen. 4 Dist. Rep. 666 (1895). Under the act of June 2, 1891, P. L. 176, the word "miner" includes all classes of miners who have had practical experience in working in a "mine," as defined by the act of Assembly. And the right of examination for certificates of qualification for the positions of mine foreman and assistant should be limited only in accordance with the above definition. Where a mine foreman cannot personally superintend the entire mine, he has authority to employ a sufficient number of competent persons to act as his assistants. It is in the interest of the public good, and the law is to be so construed, that all assistants should have a certificate of qualification before they are employed as "competent persons" to act under the provisions of the act.

Durkin v. Kingston Coal Co., 171, 198 (1895). "We are not prepared to hold the act of 1891 to be unconstitutional as a whole. It relates to all anthracite coal mines and defines what shall be regarded as such mines. Coal may be taken out of the ground by farm owners for their own use, or it may be taken in such small quantities and for such local purposes as to make the application of the mining laws to the operations so conducted not only unnecessary, but burdensome to the extent of absolute prohibition. Such limited or incipient operations are not within the mischief to remedy which the mining laws were devised. They are ordinarily conducted for purposes of exploration or for family supply, and ought not to be classed with operations conducted for the supply of the public. The business of coal mining, like that of insurance or banking, may be defined by the legislature. The definition found in the act of 1891 seems to us reasonable, to be within the fair limits of a legislative definition, and to exclude only such operations as are too small to make the general regulations provided by the act applicable to them."¹

Coal Creek M. Co. v. Davis, 90, 711 (1891). The *Tennessee*. statutory prohibition against the use of a furnace inside coal mines for ventilation purposes contained in the act of 1881, ch. 170, sec. 7, applies to mines worked by shafts, not to those worked by horizontal entries.

III. HEALTH AND SAFETY STATUTES IN THEIR RELATION TO THE LAW OF NEGLIGENCE.

Those statutes for the protection of the lives, the health and the safety of miners, which are enumerated in the preceding division, generally contain a provision for the recovery of damages for injuries occurring through failure to comply with their requirements.

The obligation of the mine owner is by them enlarged and

¹ The constitutionality of the act of May 15, 1893, is upheld in *Commonwealth v. Jones*, 4 Pa. Super. Ct. 362 (1897).

defined. His responsibility for injuries that occur by reason of his failure to comply with the provisions of the act, or which might have been prevented by such compliance, is absolute. No question of negligence arises, or, more properly, the fact of his violation of the law conclusively establishes his negligence. The violation of the law alone will not support an action for damages, if the injury was not proximately caused by the failure to comply with the law, or that failure did not directly contribute to the injury. But if the failure to comply with the law is the efficient cause of the injury, the liability is established without regard to the question whether the employer exercised ordinary care.

At the same time the violation of the statute is not a license to the employee to neglect his own safety. It will not excuse his contributory negligence; but mere knowledge of his employer's violation of the act does not amount to contributory negligence.

In Illinois, however, where the right to recover damages is based on the wilful violation of the act by the owner or operator of the mine, that right is absolute, if the violation is shown to be wilful, and it cannot be defeated by proof of the employee's negligence.

Many of these statutes require the employment by mine owners of competent superintendents or mine bosses, from a class who are licensed by the State. If the mine owner has been reasonably careful in the selection of such officers, he is not liable for their negligence. A statute which attempts to make him so responsible is void.

Colorado. *Victor Coal Co. v. Muir*, 20, 320 (1894). The primary object of the statute concerning coal mines (Sess. Laws 1885, pp. 187-141) was to secure the health and personal safety of all persons engaged in underground coal mining. While it is the duty of the mining boss to see that sufficient timber of suitable lengths and sizes is placed in the working places of the mine, the duty of securely propping the roof of the mine, by actually setting such timbers themselves, is devolved upon any miner, workman, or other person having control of any working place in the mine, and the wilful neglect of such duty is a misdemeanor under the statute: a miner who is injured by reason of such neglect is guilty of contributory negligence.

Colorado C. & I. Co. v. Lamb, 6 Ap. 255 (1895). The mine boss, under the act of 1885, is, in the absence of proof that he had other authority than that derived from the statute, a fellow servant of the miners, and the mine owner is not responsible for injuries caused to workmen by his negligence.

Illinois. *Bartlett C. & I. Co. v. Roach*, 68, 174 (1873). The act of 1872, to provide "for the health and safety of persons employed in coal mines," required "the top of each shaft" to be "securely fenced by vertical or flat gates properly covering and protecting the area of the shaft." A mining company is responsible for the death of an employee which would have been prevented if it had complied with the requirement. It is no defence that the act went into effect only a few days before, and the company had not had time to comply therewith.

Litchfield Coal Co. v. Taylor, 81, 590 (1876). In an action by a widow to recover for the death of her husband, which was caused by the use of uncovered cages for the purpose of conveying miners into and out of the mines, in violation of Rev. Stats. 1874, ch. 93, p. 704, it is no defence that the deceased was negligent. The same statute forbids hoisting coal out of shaft at the same time that miners were being hoisted. It is not a variance from a declaration alleging a violation of this law, if the evidence shows that the cage containing the miners had not yet started from the bottom of the shaft, but that the miners had been permitted to get upon it. Nor is there a variance if the declaration allege that the deceased had gone upon the cage for the purpose of being hoisted, and the evidence showed that he was struck by falling coal.

Wesley City Coal Co. v. Healer, 84, 126 (1876). The act of 1872 requires two distinct means of ingress and egress from any mine or shaft in which more than fifteen miners are employed; and gives a right of action for injury to person or property occasioned by any wilful violation of the act, and a right of action to the widow of any person killed by reason of such wilful violation.

A fire broke out in a mine having no second escapement, and in the alarm and confusion resulting therefrom a miner fell down a shaft and was killed. *Held*, the operating company was liable to the widow, without proof of negligence; nor is it a defence that the dead man did not exercise cool presence of mind, the defendant having given him reasonable cause of alarm.

Beard v. Skeldon, 13 Ap. 54 (1883). This case involves those sections of the Revised Statutes providing for health and safety of miners which require that every drum shall be provided with a sufficient brake to prevent accident "in case of the giving out or breaking of the machinery." The falling of the cage, owing to the diminishment of the amount of steam by which it was held up, caused not by defect of machinery, but neglect of the engineer, seems to be such giving out.

Beard v. Skeldon, 113, 584 (1885). "The statute expressly requires a brake on every drum, so as to prevent accident in case any of the machinery should break or give out; but we do not understand that the statute compels the furnishing of such an appliance as might prevent an accident in case the machinery should for any reason fail." But in case of the entire absence of a brake, the instructions on this point were unimportant.

Coal Co. v. Yung, 24 Ap. 255 (1887); s. c. 31 Ap. 417 (1889). Under a statute requiring the owner or operator to keep a sufficient supply of timber to be used as props, and to send down such props

when required, it is not incumbent on the owner or operator to put in the props and hold up the roof. In order to charge him with damages for an injury occurring through failure to do so, a case of negligence at common law must be made out.

Catlett v. Young, 38 Ap. 198 (1890). "When the mouth of a shaft is not protected in substantial compliance with the requirements of the statute (sec. 13, p. 209, Laws 1879), the owner necessarily must be held to have wilfully, or what is the same, knowingly failed to comply with the law; and injury to person or property which is occasioned by such failure gives a right of action without reference to the care or prudence of the person injured." "If the owner of the mine in good faith provides such gates as will substantially give the protection required by the statute, and a person in working around the mouth of the shaft fails to use ordinary care and is injured, we think there could be no recovery." Whether the appliance in use is a substantial compliance with the statute is a question for the jury.

Chicago, Wilmington, & V. C. Co. v. Peterson, 39 Ap. 114 (1891). Where a loader in a mine notifies the proper employees of the mine owner that he is in need of more props, the delivery of which, through the drivers of empty cars, was required by Sess. Laws 1887, p. 235, sec. 16, and no props were delivered to him, he might have have been justified in continuing work for a reasonable time after the demand, while expecting the props to be delivered, but to remain in a place of danger beyond such a time was contributory negligence. Under the statute it is sufficient to notify the "mine car driver" that props were wanted.

Muddy Valley M. & M. Co. v. Phillips, 39 Ap. 376 (1891). In an action for damages for injury occasioned by the explosion of gas, whether or not the mine owner's failure to comply with the requirements of the act of July 1, 1887, as to ventilation was wilful, is a question for the jury.

Consolidated Coal Co. of St. Louis v. Scheller, 42 Ap. 619 (1892). Where a master provides or prepares the place in which his servant is to work, the law does not make him the guarantor of its safety. It requires of him only the exercise of reasonable and ordinary care to have and keep it reasonably fit for the use to which it is put. Sec. 16, ch. 93, Rev. Stats., implies that where no timberman is employed it is the duty of miners, and a part of their employment, to carefully observe the roof under which they are working from day to day, and to set props wherever they appear to be needed. Where a timberman is employed, miners are not thereby relieved of the duty of observing the conditions and promptly reporting to the mine manager or timberman any signs of danger they may discover which require his services. Mine owners in this State are under no statutory obligation to absolutely keep the roof of a mine so propped that it will not fall. The employment of a timberman in a mine is not an exception to the rule that servants in a given employment assume all risk of injury arising from the negligence of fellow servants. An employer is not bound to give his servant notice of the ordinary dangers pertaining to the particular service, "for the reason that all persons engaged in it are presumed to know them."

Catlett v. Young, 143, 74 (1892). Sec. 8, act of May 29, 1879, provided that the top of every shaft should be securely fenced by gates properly covering and protecting such shaft and entrance thereto. Section 14 gave a right of action for personal injury or death occasioned by any wilful violation of the act or wilful failure to comply with any of its provisions. The contributory negligence of the person injured is no defence to such an action, nor does the fact that the defendant so fenced and protected the shaft as to sufficiently protect a person in the exercise of ordinary care, make his failure to comply with the act not wilful. If the defendant knowingly and deliberately failed to comply with the provisions of the act, and the injury was caused by reason of such failure, he is liable.

Springside Coal M. Co. v. Grogan, 53 Ap. 60 (1892). Sec. 4, ch. 63, Rev. Stats., only imposes a liability for wilful violation of the statute. The failure to fence the top of a shaft is not necessarily wilful.

Girard Coal Co. v. Wiggins, 52 Ap. 69 (1893). While secs. 6 and 7, ch. 93, Rev. Stats., make it the duty of owners and operators of mines to provide safe means for carrying persons into and out of the mines, and to place competent, experienced, and temperate engineers in charge of their steam engines, section 14 of the same statute only imposes a liability for wilful violation of these duties. A wilful violation of the statute is a violation of its provisions knowingly and deliberately. "Negligence so gross in character as to amount to recklessness, and to indicate a willingness to subject others to a known and avoidable risk, may support a charge of wilful and intentional wrong, but the failure to use ordinary care does not necessarily include the element of wilfulness. A charge of wilfulness is not maintained by proof of mere negligence."

Where recovery is sought on the ground of defendant's wilful violation of the statute, neither plaintiff's contributory negligence nor the fact that the injury occurred through the negligence of a fellow employee are good defences.

Linton C. & M. Co. v. Persons, 11 Ap. 264 (1894). The **Indiana** mining boss whose employment is required by the act of March 2, 1891, does not stand in the relation of fellow servant to the miners under him. The mine-owner is responsible for the negligence of the mining boss. His duty is not discharged by the use of due care in the employment of a competent boss.

In order to state a good cause of action for negligence under this act, the employee must allege in his complaint that the negligence on account of which he seeks to recover was the proximate cause of his injury, and that he was free from fault. The statute does not change the rule of pleading on the question of contributory negligence.

Crabell v. Wapello Coal Co., 68, 751 (1886). The **Iowa** provision in "An act to regulate mines and mining," sec. 15, ch. 202, Laws of 1880, making it a misdemeanor for any miner, workman, or other person to ride on a loaded car or wagon in a shaft or slope, applies only to intermeddlers, and not to a conductor of a train of such cars who rides upon them in the performance of his duty.

Maine. *Hare v. McIntire*, 82, 240 (1890). The remedy provided by Rev. Stats., ch. 17, sec. 23, etc., for recovery of damages for a personal injury caused by the blasting of rocks, does not apply to workmen in a quarry, but is confined to strangers.

Wadsworth v. Marshall, 88, 263 (1896). Under Rev. Stats. ch. 17, secs. 23 and 24, it is the duty of persons blasting lime or other rocks before each explosion to give seasonable notice so that all persons shall have time to retire to a safe distance. Failure to give such notice is negligence *per se*. To an action under the statute contributory negligence is a good defence.

Missouri. *Spiva v. Osage Coal Min. Co.*, 88, 68 (1885). A miner's widow cannot recover damages for his death under act of March 23, 1881, p. 165, "providing for the health and safety of persons in coal mines, and providing for the inspection of the same," upon the ground that the top of the mine was not fenced as required by the act, unless the failure to fence is shown to be the cause. The failure of the mine owner to comply with the requirements of the act does not excuse the miner from the consequence of contributory negligence.

Fell v. Rich Hill Coal Min. Co., 23 Ap. 216 (1886). The definition of "owner" in sec. 6, act of March 23, 1881, p. 167, while extending the ordinary meaning of "owner" so as to make it apply to a party operating the mine under contract with the actual owner, does not acquit the actual owner who has engaged another to open his mine, reserving to himself the obligation and burden of furnishing and operating that part of the machinery which occasions the injury to the employee.

Durant v. Lexington Coal Min. Co., 97, 62 (1888). A person employed as a cager at the bottom of the shaft of a coal mine is within the protection of the provision of the act of March 23, 1881, p. 165, requiring the owner, agent, or operator of such mine to "provide safe means of hoisting and lowering persons, in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft," and may, under the provisions of said act, recover damages for injuries received from the falling of a piece of coal from the car, which if properly guarded would have prevented the injury.

Mere knowledge by the plaintiff of the defendant's failure to have the mine provided with the protections required by the law will not defeat the action.

Leslie v. Rich Hill C. M. Co., 110, 31 (1892). Where a statute makes it the duty of the owner, agent, or operator of any coal mine to keep a sufficient supply of timber when required, to be used as props, and gives a right of action to one injured by any wilful failure to comply with the requirements of the act, knowledge on the part of the owner that props were necessary is essential to a recovery by an injured person. A wilful failure necessarily implies such knowledge.

The owner is liable where the mine was operated by another, under an agreement by which the duty of furnishing timber for props devolved on the owner.

Ohio. *Coal & Mining Co. v. Clay*, 51, 542 (1894). Sec. 6871, Rev. Stats., which provides that "any miner or other person employed in any mine governed by the statute, who intentionally and wilfully neg-

lects or refuses to securely prop the roof of any place under his control," shall be guilty of an offence, etc., is intended to protect the lives and limbs of those engaged in a perilous business. It imposes an obligation to perform a duty to others, and anything which tends to operate in opposition to that obligation violates the policy of the statute.

In an action for damages for the death of such a miner caused by the falling of the roof of the mine, it was held that a custom at the particular mine, which imposes upon another employee the work of posting and propping the roof of a room in which coal is to be mined, cannot have the effect of exonerating the miner from the duty enjoined by the statute, nor shift the risk undertaken by himself to the company.

Krause v. Morgan, 53, 26 (1895). An employee cannot maintain an action under sec. 301 of the Revised Statutes for injury caused by wilful failure to comply with the requirements of the act as to keeping the mine free from gas, where the plaintiff is himself guilty of contributory negligence.

Coal Co. v. Estievenard, 53, 43 (1896). Under Rev. Stats. 6871 it is the duty of the owner, agent or operator of a coal mine to keep a supply of timber constantly on hand, and to deliver the same to the working place of the miner, and a failure so to do is negligence on his part, and if an injury is proximately caused thereby, an action will lie to recover damage therefor. But if the owner failed to supply the necessary timber, and a miner knowing the roof to be unsafe went into and remained in the room, which he knew had not been propped, he is guilty of contributory negligence and cannot recover. When a sufficient supply of timber has been furnished by the owner, it is the duty of the miner to securely prop the roof; and if he fails to do so, whether through neglect or mistake in judgment, and sustains an injury thereby, he cannot recover.

Honor v. Roberts, 5 L. L. R. 9 (1876). The act of March 3, 1870, sec. 24, does not relieve the party seeking to recover damages for injuries, from the operation of the rule as to contributory negligence.

D. & H. Canal Co. v. Carroll, 89, 374 (1879). A mine boss appointed under provisions of the act of March 3, 1870, is a fellow servant of the miners; and where the death of one of the latter is caused by the negligence of the former, the owners of the mine are not responsible, unless it is shown that they employed as mine boss an incompetent man, knowing him to be such, or employed him without knowledge of his capacity or fitness, or without making such inquiries as to his qualifications as a man of ordinary prudence would do.

Waddell v. Simoson, 112, 567 (1886). Where mine operators have complied with the act of March 3, 1870, and provided a practical and competent overseer or mine boss, they are not liable for damages to any other employee caused by his negligence.

Mine boss and driver boy employed to haul coal from the chambers of the mine are fellow servants.

Redstone Co. v. Roby, 115, 364 (1886). A mining boss, under the act of April 28, 1877, P. L. 58, is a fellow servant with the miner, for whose negligence his employer is not liable. He is a creature of the legislature, selected by the operator of a coal mine in obedience to the

command of the law, and in the interest and for the protection of the miners; where, therefore, reasonable care in his selection has been exercised, the operator is not liable for injuries resulting from his negligence. The operator of a coal mine fulfils the measure of his duty to his employees if he commits his work to careful and skilful bosses and superintendents, who conduct the same to the best of their skill and ability.

Christner v. Cumberland & Elk L. C. Co., 146, 67 (1892). Injuries received by a coal miner having been caused proximately by his own negligence, his right of action against the mine owner therefor is not supported by proof of the defendant's violation of the provisions of the act of June 30, 1885, P. L. 205, when the violations in no way proximately caused or contributed to the injuries.

Lineoski v. Susquehanna Coal Co., 157, 153 (1893). A mining boss under the act of June 30, 1885, is the fellow servant of other workmen engaged in the mine, and if proper care has been exercised in selecting a competent person for the position, the employer is not liable for his negligence.

The provision of rule 24 of the 12th article of the act of June 30, 1885, requiring the mine owner to give notice of any apprehended danger to the mine foreman, does not make the latter the representative of the former for all purposes, so as to charge the owner with liability.

Opinion of Attorney-General, 14 C. C. R. 447 (1894). Under the act of May 15, 1893, the mine foreman and mine boss, in addition to having knowledge and practical experience, must be able to read and write.

Mulhern v. Lehigh Valley C. Co., 161, 270 (1894). The act of June 30, 1885, requiring the employment of a sober and competent engineer, does not change the common law rule of the employer's liability for the acts of his employee. A mining company is not liable for an injury to a miner caused by a mishap by the engineer, where there is no evidence that the company had knowledge that the engineer was incompetent.

Gray v. Germania Coal Co., 164, 508 (1894). Where the mine owner has placed the entire control and management of the inside operation of his mine in the hands of a mine boss having a certificate of competency, as provided by the act of June 30, 1885, P. L. 205, whose competency is not questioned, the mine owner is not liable for negligence in such operation unless he personally participated therein. The question of his personal participation is for the jury.

Durkin v. Kingston Coal Co., 171, 193 (1895). Sec. 8, art. 17, of the act of June 2, 1891, in so far as it imposed liability of the mine owner for the failure of a mine foreman to comply with the provisions of the act which compels his employment and defines his duties, is unconstitutional and void. The State having certified to the competency of the foreman, and compelled his employment, cannot make the mine owner responsible for his incompetency and negligence.

A mine foreman who neglects to examine the roads and ways in use in each mine each day, as required by the act of June 2, 1891, is liable personally for injuries sustained by a miner resulting from his neglect.

West Virginia. *Graham v. Newburg Oriel C. & C. Co.*, 38, 273 (1893). The omission by the operator of a coal mine of the duty to provide the means of ventilation and to employ fire and mining bosses, as required by Code of 1891, p. 991, and acts of 1887, ch. 50, is negligence, and renders him liable to an employee for injury resulting from such omission of duty.

APPENDIX.

UNITED STATES STATUTES.

MINERAL LANDS AND MINING RESOURCES.

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. Rev. Stats. 2318.

Mineral lands reserved.

The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit:

Mineral lands not subject to pre-emption

Fourth. Lands on which are situated any known salines or mines. Rev. Stats. 2258.

Nor shall any mineral lands be liable to entry and settlement under its [chapter on Homesteads] provisions. Rev. Stats. 2302.

nor to homestead entry.

Town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law.

Town-site entries not to include mining rights.

When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof, and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, that no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant. Act of March 3, 1891, ch. 561, sec. 16; 26 Stat. L. 1095; Supp. to Rev. Stats., Vol. 1, p. 945.

Mining claims in incorporated towns preserved.

Prior rights of surface owners protected.

Mineral lands in certain States excepted.

The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any *bona fide* entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands. Rev. Stats. 2345.

Within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral are hereby excluded from the operation of the act entitled "An act to promote the development of mining resources of the United States," approved May 10, 1872, and all lands in such States shall be subject to disposal as agricultural lands. Act of May 5, 1876, ch. 91; 19 Stat. L. 52; Supp. to Rev. Stats., Vol. 1, p. 104.

Within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided however*, that all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale. Act of March 3, 1883, ch. 118; 22 Stat. L. 487; Supp. to Rev. Stats., Vol. 1, p. 404.

Grants of lands to States or corporations not to include mineral lands.

No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant. Rev. Stats. 2346.

Mineral lands in military reservations.

Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States. Act of July 5, 1884, ch. 214, sec. 5; 23 Stat. L. 103; Supp. to Rev. Stats., Vol. 1, p. 455.

Mineral lands open to purchase.

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to

occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. Rev. Stats. 2319.

By citizens.

Local regulations.

Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other. Rev. Stats. 2320.

Length of mining claims upon veins and lodes.

Discovery of mineral.

Width of lode claims.

End lines.

Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation. Rev. Stats. 2321.

Proof of citizenship.

Applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record or before any notary public of any State or Territory. Act. of April 26, 1882, ch. 106, sec. 2; 22 Stat. L. 49; Supp. to Rev. Stats., Vol. 1, p. 338.

Of non-resident applicants.

The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United

Locators' rights of possession and enjoyment.

- Apex rule.** States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. Rev. Stats. 2322.
- Owners of tunnels, rights of.** Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. Rev. Stats. 2323.
- Regulations made by miners.** The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of
- Marking on the ground.**
- Record of location.**
- Annual work.**

May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and after such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. Rev. Stats. 2324.

On claims held
in common.

Forfeiture and
relocation.

Forfeiture to co-
owner.

By act of Feb. 11, 1875, ch. 41 (Rev. Stats., 2d ed., sec. 2324), this section is so amended that "where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same."

Tunnels, cost of,
how treated.

Sec. 2324 is amended by adding the following words: "Provided, that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two." Act of Jan. 22, 1880, ch. 9, sec. 2; 21 Stat. L. 61; Supp. to Rev. Stats., Vol. 1, p. 276.

On unpatented
claims, year's work
required by law to
commence Jan. 1
after location.

Patents for mineral lands, how obtained.

Application, plat, and field-notes.

Posting and publication of notice.

Certificate of expenditure.

Proofs.

In absence of adverse claim entitled to patent.

Purchase money.

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter: *Provided*, that where the claimant for a

patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits. Rev. Stats. 2325, as amended by act of Jan. 22, 1880, ch. 9, sec. 1; 21 Stat. L. 61; Supp. to Rev. Stats., Vol. 1, p. 276.

Application by agent or attorney where applicant is non-resident.

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall be issued thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever. Rev. Stats., sec. 2326.

Adverse claim, proceedings on, filing of and its effect.

Action on adverse claim.

Judgment and filing of certificate thereof.

Proceedings by successful party to obtain patent.

Where judgment is for several parties.

Oath of adverse claimant, before whom administered.

The adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly-authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory. Act of April 26, 1882, ch. 106, § 1; 22 Stat. L. 49; Supp. to Rev. Stats., Vol. 1, p. 338.

If neither party proves title, jury so to find.

If in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title. Act of March 3, 1881, ch. 140; 21 Stat. L. 505; Supp. to Rev. Stats., Vol. 1, p. 324.

Possessory actions for recovery of mining titles.

No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession. Rev. Stats. 910.

Description of vein claims on surveyed and unsurveyed lands.

The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim. Rev. Stats. 2327.

Pending applications; existing rights.

Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter, where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two. Rev. Stats. 2328.

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. Rev. Stats. 2329.

Placer claims defined. Subject to entry and patent.

Must conform to legal subdivisions.

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser. Rev. Stats. 2330.

Joint entry of placer claims.

Extent of placer claims.

Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes. Rev. Stats. 2331.

Conformity of placer claims to surveys, limitation of claims.

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mining claims: *Provided*, that lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act. Act of Aug. 4, 1892, ch. 375; 27 Stat. L. 348; Supp. to Rev. Stats., Vol. 2, p. 65.

Building-stone lands to be entered under placer-claim laws.

Any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions

Oil lands to be entered under placer-claim laws.

of the laws relating to placer mineral claims: *Provided*, that lands containing petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof. Act of Feb. 11, 1897.

Right to a patent may be established by possession under Statute of Limitations.

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent. Rev. Stats. 2332.

Proceedings for patent for placer claim, where lode is included within its boundaries.

Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof. Rev. Stats. 2333.

Purchase money.

Surveyor-general to appoint surveyors of mining claims, etc. Surveys and expenses.

The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and

subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land Office. Rev. Stats. 2334.

All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of the land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or, if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given. Rev. Stats. 2335.

Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. Rev. Stats. 2336.

Verification of affidavits, etc.

Testimony in contests.

Where veins intersect. Cross veins.

Uniting veins.

Patents for mill sites.

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section. Rev. Stats. 2337.

What conditions of sale may be made by local legislature.

As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent. Rev. Stats. 2338.

Vested rights to use of water for mining, etc.; right of way for canals.

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. Rev. Stats. 2339.

Patents, pre-emption, and homesteads subject to vested and accrued water rights.

All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section. Rev. Stats. 2340.

Mineral lands in which no valuable mines are discovered are open to homesteads.

Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered,

and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads." Rev. Stats. 2341.

Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same. Rev. Stats. 2342.

The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter. Rev. Stats. 2343.

Nothing contained in this chapter shall be construed to impair in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six. Rev. Stat. 2344.

Mineral lands,
how set apart as
agricultural lands.

Additional land
districts and offi-
cers, power of
President to pro-
vide.

Provisions of
this chapter not to
affect certain
rights.

COAL LANDS.

Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road. Rev. Stats. 2347.

Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal

Entry of coal
lands.

Limit of claim.

Purchase money.

Pre-emption of
coal lands.

mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, that when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements. Rev. Stats. 2348.

Pre-emption claims of coal land to be presented within sixty days, etc.

All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three. Rev. Stats. 2349.

Only one entry allowed by same person or association.

The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant. Rev. Stats. 2350.

Limitation of preference right of entry.

Conflicting claim.

In case of conflicting claims upon coal lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where im-

Priority of possession and improvement prevails.

provements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections. Rev. Stats. 2351.

L. O. Regulations.

Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper. Rev. Stats. 2352.

Rights reserved.

SALINE LANDS.

1. Whenever it shall be made appear to the register and the receiver of any land office of the United States that any lands within their district are saline in character, it shall be the duty of said register and said receiver, under the regulations of the General Land Office, to take testimony in reference to such lands to ascertain their true character, and to report the same to the General Land Office;

Saline lands to be examined by registers and receivers.

And if, upon such testimony, the Commissioner of the General Land Office shall find that such lands are saline and incapable of being purchased under any of the laws of the United States relative to the public domain, then, and in such case, such lands shall be offered for sale by public auction at the local land office of the district in which the same shall be situated, under such regulations as shall be prescribed by the Commissioner of the General Land Office, and sold to the highest bidder for cash, at a price not less than one dollar and twenty-five cents per acre;

— to be sold at public auction.

And in case said lands fail to sell when so offered, then the same shall be subject to private sale, at such land office, for cash, at a price not less than one dollar and twenty-five cents per acre, in the same manner as other lands of the United States are sold:

— may be sold at private sale, when.

Provided, that the foregoing enactments shall not apply to any State or Territory which has not had a grant of salines by act of Congress, nor to any State which may have had such a grant, until either the grant has been fully satisfied, or the right of selection thereunder has expired by efflux of time.

Act not to apply to certain States, etc.

But nothing in this act shall authorize the sale or conveyance of any title other than such as the United States has, and the patents issued shall be in the form

Patents to be only a release, etc.

of a release and quitclaim of all title of the United States in such lands.

Proclamation of sale of public lands, where to be published.

2. All executive proclamations relating to the sales of public lands shall be published in only one newspaper, the same to be printed and published in the State or Territory where the lands are situated, and to be designated by the Secretary of the Interior. Act of Jan. 12, 1877, ch. 18; 19 Stat. L. 221; Supp. to Rev. Stats., Vol. 1, p. 127.

TIMBER RIGHTS.

Timber may be cut from mineral lands for building, agricultural, mining, and domestic purposes.

1. All citizens of the United States and other persons, *bona fide* residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes:

Provided, the provisions of this act shall not extend to railroad corporations.

Registers and receivers to ascertain and notify Commissioner when timber is cut for unauthorized purposes.

2. It shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and if so, they shall immediately notify the Commissioner of the General Land Office of that fact;

And all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

Penalty for violation of act.

3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months. Act of June 3, 1878, ch. 150; 20 Stat. L. 88; Supp. to Rev. Stats., Vol. 1, p. 166.

PROTECTION OF THE LIVES OF MINERS IN THE
TERRITORIES.

1. In each organized and unorganized Territory of the United States wherein are located coal mines, the aggregate annual output of which shall be in excess of one thousand tons per annum, the President shall appoint a mine inspector, who shall hold office until his successor is appointed and qualified.

Inspectors of
coal mines in
Territories to be
appointed.

Such inspector shall, before entering upon the discharge of his duties, give bond to the United States in the sum of two thousand dollars, conditioned for the faithful discharge of his duties.

Bond.

2. No person shall be eligible for appointment as mine inspector under section one of this act, who is not either a practical miner or mining engineer and who has not been a resident for at least six months in the Territory for which he shall be appointed; and no person who shall act as land agent, manager, or agent of any mine, or as mining engineer, or be interested in operating any mine in such Territory shall be at the same time an inspector under the provisions of this act.

Qualifications.

3. It shall be the duty of the mine inspector provided for in this act to make careful and thorough inspection of each coal mine operated in such Territory, and to report at least annually upon the condition of each coal mine in said Territory with reference to the appliances for the safety of the miners, the number of air or ventilating shafts, the number of shafts or slopes for ingress or egress, the character and condition of the machinery for ventilating such mines, and the quantity of air supplied to same.

Duties.

Such report shall be made to the governor of the Territory in which such mines are located and a duplicate thereof forwarded to the Secretary of the Interior, and in the case of any unorganized Territory directly to the Secretary of the Interior.

Reports.

4. In case the said mine inspector shall report that any coal mine is not properly constructed or not furnished with reasonable and proper machinery and appliances for the safety of the miners and other employees it shall be the duty of the Secretary of the Interior to give notice to the owners and managers of said coal mine that the said mine is unsafe and notifying them in what particular the same is unsafe, and requiring them to furnish or provide such additional machinery, slopes, entries, means of escape, ventilation, or other appliances necessary to the safety of the miners and other employees within a period to be in said notice named, and if the same be not fur-

Notification of
unsafe condition of
mines.

nished as required in such notice it shall be unlawful after the time fixed in such notice for the said owners or managers to operate said mine.

Two shafts for each mine.

5. In all coal mines in the Territories of the United States the owners or managers shall provide at least two shafts, slopes, or other outlets, separated by natural strata of not less than one hundred and fifty feet in breadth, by which shafts, slopes, or outlets distinct means of ingress and egress shall always be available to the persons employed in said mine. And in case of the failure of any coal mine to be so provided it shall be the duty of the mine inspector to make report of such fact, and thereupon notice shall issue, as provided in section four of this act, and with the same force and effect.

Ventilation to be provided.

6. The owners or managers of every coal mine at a depth of one hundred feet or more shall provide an adequate amount of ventilation of not less than fifty-five cubic feet of pure air per second, or thirty-three hundred cubic feet per minute, for every fifty men at work in said mine, and in like proportion for a greater number, which air shall by proper appliances or machinery be forced through such mine to the face of each and every working place, so as to dilute and render harmless and expel therefrom the noxious or poisonous gases; and all workings shall be kept clear of standing gas.

Penalty for failure to comply.

7. Any mine owner or manager who shall continue to operate a mine after failure to comply with the requirements of this act and after the expiration of the period named in the notice provided for in section four of this act, shall be deemed guilty of a misdemeanor, and shall be fined not to exceed five hundred dollars.

Furnace shaft.

8. In no case shall a furnace shaft be used or for the purposes of this act be deemed an escape shaft.

Construction of escape shafts.

9. Escape shafts shall be constructed in compliance with the requirements of this act within six months from the date of the passage hereof, unless the time shall be extended by the mine inspector, and in no case shall said time be extended to exceed one year from the passage of this act.

Speaking-tubes.

10. A metal speaking-tube from the top to the bottom of the shaft or slope shall be provided in all cases, so that conversation may be carried on through the same.

Safety catches.

11. An approved safety catch shall be provided and sufficient cover overhead on every carriage used in lowering or hoisting persons. And the mine inspector shall examine and pass upon the adequacy and safety of all such hoisting apparatus.

12. No child under twelve years of age shall be employed in the underground workings of any mine. And no father or other person shall misrepresent the age of anybody so employed.

Children under twelve not to work under ground.

Any person guilty of violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed one hundred dollars.

Penalty for violation.

13. Only experienced and competent and sober men shall be placed in charge of hoisting apparatus or engines. And the maximum number of persons who may ascend or descend upon any cage or hoisting apparatus shall be determined by the mine inspector.

Men in charge of hoisting apparatus.

14. The inspector may enter and inspect any coal mine in his district and the work and machinery belonging thereto at all reasonable times, but so as not to impede or obstruct the working of the mine; and to make inquiry into the state of the mine, works, and machinery, and the ventilation and mode of lighting the same, and into all matters and things connected with or relating to the safety of the persons employed in or about the same, and especially to make inquiry whether the provisions of this act are complied with;

Inspection, how and when made.

And the owner or agent is hereby required to furnish means necessary for such entry, inspection, examination, and inquiry, of which the said inspector shall make an entry in the record in his office, noting the time and material circumstances of the inspection.

Owners to furnish means for.

15. In all cases of fatal accident a full report thereof shall be made by the mine owner or manager to the mine inspector, said report to be in writing and made within ten days after such deaths shall have occurred.

Fatal accidents to be reported.

16. As a cumulative remedy, in case of the failure of any owner or manager of any mine to comply with the requirements contained in the notice of the Governor of such Territory or the Secretary of the Interior, given in pursuance of this act, any court of competent jurisdiction, or the judge of such court in vacation, may, on the application of the mine inspector in the name of the United States and supported by the recommendation of the Governor of said Territory, or of the Secretary of the Interior, issue an injunction restraining the further operation of such mine until such requirements are complied with, and in order to obtain such injunction no bond shall be required.

Injunction to prevent working of mines.

17. Wherever the term "owner or manager" is used in this act the same shall include lessees or other persons controlling the operation of any mine.

"Owner or manager" defined.

And in case of the violation of the provisions of this act by any corporation the managing officers and superintendents, and other managing agents of such corpora-

Inspector's
salary, etc.

Territorial
statute to super-
sede this law.

tion, shall be personally liable and shall be punished as provided in act for owners and managers.

18. The mine inspectors provided for in this act shall each receive a salary of two thousand per annum, and their actual travelling expenses when engaged in their duties.

19. Whenever any organized Territory shall make or has made provision by law for the safe operation of mines within such Territory, and the governor of such Territory shall certify said fact with a copy of the said law to the Secretary of the Interior, then and thereafter the provisions of this act shall no longer be enforced in such organized Territory, but in lieu thereof the statute of such Territory shall be operative in lieu of this act. Act of March 3, 1891, ch. 564, secs. 1-19; 26 Stat. L. 1104; Supp. to Rev. Stats., Vol. 1, pp. 948-950.

LAND OFFICE REGULATIONS.

MINERAL LANDS OPEN TO EXPLORATION, OCCUPATION, AND PURCHASE.

1. It will be perceived that by the foregoing provisions of law the mineral lands in the public domain, surveyed or unsurveyed, are open to exploration, occupation, and purchase by all citizens of the United States and all those who have declared their intentions to become such.

STATUS OF LODE CLAIMS LOCATED PRIOR TO MAY 10, 1872.

2. By an examination of the several sections of the Revised Statutes, it will be seen that the *status* of lode claims located *previous* to the 10th May, 1872, is not changed with regard to their *extent along the lode or width of surface*.

3. Mining rights acquired under such previous locations are, however, enlarged by such Revised Statutes in the following respect, viz.: The locators of all such previously taken veins or lodes, their heirs and assigns, so long as they comply with the laws of Congress and with State, Territorial, or local regulations not in conflict therewith, governing mining claims, are invested with the exclusive possessory right of all the surface included within the lines of their locations, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such locations at the surface, it being expressly provided, however, that the right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as aforesaid, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes, or ledges; no right being granted, however, to the claimant of such outside portion of a vein or ledge to enter upon the surface location of another claimant.

4. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed* on May 10, 1872, and that where such other vein or ledge was so adversely claimed at that date, the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

5. In order to hold the possessory title to a mining claim located prior to May 10, 1872, and for which a patent has not been issued, the

law requires that *ten dollars* shall be expended annually in labor or improvements on each claim of *one hundred feet* on the course of the vein or lode until a patent shall have been issued therefor; but where a number of such claims are held in common upon the same vein or lode, the aggregate expenditure that would be necessary to hold all the claims, at the rate of ten dollars per hundred feet, may be made upon any one claim; a failure to comply with this requirement in any one year subjecting the claim upon which such failure occurred to relocation by other parties, the same as if no previous location thereof had ever been made, unless the claimants under the original location shall have resumed work thereon after such failure and before such relocation. The first annual expenditure upon claims of this class should have been performed subsequent to May 10, 1872, and prior to January 1, 1875. From and after January 1, 1875, the required amount must be expended *annually* until patent issues. By decision of the honorable Secretary of the Interior, dated March 4, 1879, such annual expenditures are not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

6. Upon the failure of any one of several co-owners of a vein, lode, or ledge, which has not been entered, to contribute his proportion of the expenditures necessary to hold the claim or claims so held in ownership in common, the co-owners, who have performed the labor or made the improvements as required by said Revised Statutes, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

PATENTS FOR VEINS OR LODES HERETOFORE ISSUED.

7. Rights under patents for veins or lodes heretofore granted under previous legislation of Congress are enlarged by the Revised Statutes so as to invest the patentee, his heirs or assigns, with title to all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies within the end and side boundary lines of his claim on the surface, as patented, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side-lines of the claim at the surface. The right of possession to such outside parts of such veins or ledges to be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of the claims at the

surface, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges; it being expressly provided, however, that all veins, lodes, or ledges, the top or apex of which lies inside of such surface locations, *other than the one named in the patent, which were adversely claimed on the 10th May, 1872,* are excluded from such conveyance by patent.

8. Applications for patents for mining claims pending at the date of the act of May 10, 1872, may be prosecuted to final decision in the General Land Office, and where no adverse rights are affected thereby, patents will be issued in pursuance of the provisions of the Revised Statutes.

MANNER OF LOCATING CLAIMS ON VEINS OR LODES AFTER
MAY 10, 1872.

9. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made subsequent to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

10. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end-lines of such claims to be in all cases parallel to each other. Said lateral measurements cannot extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet cannot be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

11. By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken, depends upon the local regulations or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse

claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

12. It is provided by the Revised Statutes that the miners of each district may make rules and regulations not in conflict with the laws of the United States, or of the State or Territory in which such districts are respectively situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. They likewise require that the location shall be so distinctly marked on the ground that its boundaries may be readily traced. This is a very important matter, and locators cannot exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

13. The statutes provide that no lode claim shall be recorded until after the discovery of a vein or lode within the limits of the claim located, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

14. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft, or run a tunnel or drift, to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, points of intersection of well known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

15. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

16. Within a reasonable time, say twenty days after the location shall have been marked on the ground, or such time as is allowed by the local laws, notice thereof, accurately describing the claim in manner aforesaid, should be filed for record with the proper recorder of the district, who will thereupon issue the usual certificate of location.

17. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed, or improvements made thereon annually until entry shall have been made. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Expenditure made or labor performed prior to the first day of January succeeding the date of location will not be considered as a part of, or applied upon the first annual expenditure required by law. Failure to make the expenditure or perform the labor required will subject the claim to relocation by any other party having the necessary qualifications unless the original locator, his heirs, assigns, or legal representatives have resumed work thereon after such failure and before such relocation.

18. The expenditures required upon mining claims may be made from the surface or in running a tunnel for the development of such claims, the act of February 11, 1875, providing that where a person or company has, or may, run a tunnel for the purpose of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same.

19. The importance of attending to these details in the matter of location, labor, and expenditure will be the more readily perceived when it is understood that a failure to give the subject proper attention may invalidate the claim.

TUNNEL RIGHTS.

20. Section 2323 provides that where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins or lodes on the line of said tunnel.

21. The effect of this is simply to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from

the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist.

22. The term "face," as used in said section, is construed and held to mean the first working-face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted, upon which prospecting is prohibited as aforesaid.

23. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course of direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well known objects in the vicinity by which to fix and determine the *locus* in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

24. At the time of posting notice and marking out the lines of the tunnel as aforesaid, a full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

25. By a compliance with the foregoing much needless difficulty will be avoided, and the way for the adjustment of legal rights acquired in virtue of said section 2323 will be made much more easy and certain.

26. This office will take particular care that no improper advantage is taken of this provision of law by parties making or professing to make tunnel locations, ostensibly for the purposes named in the statute, but really for the purpose of monopolizing the lands lying in

front of their tunnels to the detriment of the mining interests and to the exclusion of *bona fide* prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statutes; and a *reasonable diligence* on their part in prospecting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all undiscovered veins on the line of such tunnel.

MANNER OF PROCEEDING TO OBTAIN GOVERNMENT TITLE TO VEIN OR LODE CLAIMS.

27. By section 2325 authority is given for granting titles for mines by patent from the government to any person, association, or corporation having the necessary qualifications as to citizenship and holding the right of possession to a claim in compliance with law.

28. The claimant is required in the first place to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies; such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field-notes, in each case, will be prepared by the surveyor-general; one plat and the original field-notes to be retained in the office of the surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and one copy of the field-notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district to be retained on his files for future reference. As there is no resident surveyor-general for the State of Arkansas, applications for the survey of mineral claims in said State should be made to the Commissioner of this office, who, under the law, is *ex officio* the United States surveyor-general.

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine, or lode; the mining district and county; whether the location is of record, and if so, where the record may be found; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims, etc.

30. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receive a copy of such plat and the field-notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses, that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the notice so posted to be attached to, and form a part of, said affidavit.

31. Accompanying the field-notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

32. This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as follows, viz.: Where he claims to be the locator, or a locator in company with others who have since conveyed their interests in the location to him, a full, true, and correct copy of such location notice should be furnished, as the same appears upon the mining records; such copy to be attested by the seal of the recorder, or if he has no seal, then he should make oath to the same being correct, as shown by his records. Where the applicant claims only as purchaser, a copy of the location record must be filed under seal or upon oath as aforesaid, with an abstract of title, under seal or oath as aforesaid, brought down to date of filing the application, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant, also certifying that no conveyances affecting the title to the claim in question appear of record other than those set forth in the accompanying abstract.

The abstracts herein required may be certified to by the proper recorder, or by any abstractor or abstract company, duly authorized by State or Territorial statute, if abstracts so certified by abstractors or abstract companies are by statute receivable as evidence in the courts of such State or Territory, in the same manner and to like extent that abstracts certified by the recorder are now admitted: *Provided*, that proof be furnished that the abstracts so certified by abstractors or abstract companies are receivable as evidence in the courts as aforesaid.

33. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

34. Upon the receipt of these papers the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper ten consecutive insertions are necessary; when in a *daily* newspaper the notice must appear in each issue for sixty-one consecutive issues, the first day of issue being excluded in estimating the period of sixty days.

35. The notices so published and posted must be as full and complete as possible, and embrace all the *data* given in the notice posted upon the claim.

36. Too much care cannot be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

37. In the publication of final-proof notices the register has *no discretion* under the law to designate any other than the newspaper "nearest the land" for such purpose when such paper is a newspaper of general circulation. But he will in all cases designate the newspaper of general circulation that is published nearest the land, geographically measured. When two or more such newspapers are published in the same town, nearest the land, he may select the one which, in his honest and impartial judgment as a public officer, will best subserve the purpose of the law and the general interests of the public.

38. Newspaper charges must not exceed the rates established by this office for the publication of legal notices.

39. The claimant, either at the time of filing these papers with the register or at any time during the sixty days' publication, is required to file a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made upon the claim by the applicant or his grantors; that the plat filed by the claimant is correct; that the field-notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated into a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof.

40. It will be the more convenient way to have this certificate indorsed by the surveyor-general, both upon the plat and field-notes of survey filed by the claimant as aforesaid.

41. After the sixty days' period of newspaper publication has expired the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

42. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field-notes of survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office; after which the whole matter will be forwarded to the Commissioner of the General Land Office, and a patent issued thereon if found regular.

43. In sending up the papers in the case, the register must not omit certifying to the fact that the notice was posted in his office for the full

period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

44. The consecutive series of numbers of mineral entries must be continued, whether the same are of lode or placer claims or mill sites.

45. The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field-notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim, with reference to the lines of public surveys, by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line must be surveyed by the deputy mineral surveyor at the time of his making the particular survey, and be made a part thereof.

46. Upon the approval of the survey of a mining claim made upon surveyed lands, the surveyor-general will prepare and transmit to the local land office and to this office a diagram tracing showing the portions of legal 40-acre subdivisions made fractional by reason of the mineral survey, designating each of such portions by the proper lot number, beginning with No. 1 in each section, and giving the area of each lot.

47. The survey and plat of mineral claims, required by section 2325, Revised Statutes of the United States, to be filed in the proper land office, with application for patent, must be made subsequent to the recording of the location of the mine; and when the original location is made by survey of a United States deputy surveyor such location survey cannot be substituted for that required by the statute, as above indicated.

48. The surveyor-general should derive his information upon which to base his certificate as to the value of labor expended or improvements made from his deputy who makes the actual survey and examination upon the premises, and such deputy should specify with particularity and full detail the character and extent of such improvements.

49. The following particulars should be observed in the survey or every mining claim:—

(1) The exterior boundaries of the claim should be represented on the plat of survey and in the field-notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field-notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:—

	Acres.
Total area of claim	10.50
Area in conflict with survey No. 302	1.56
Area in conflict with survey No. 948	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field-notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. It is better that the application for patent should state the portions to be excluded in express terms. A survey executed as in the example given will enable the applicant for patent to exclude such conflicts as may seem desirable. For instance, the conflict with survey No. 302 and with the Mountain Maid lode claim might be excluded, and that with survey No. 948 included.

50. The rights granted to locators under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be "situated on the *public domain*." In applications for lode claims where the survey conflicts with a prior valid lode claim and the ground in conflict is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it. The end line of his survey should not, therefore, be established beyond such intersection.

51. Where, however, the lode claim for which survey is being made was located prior to the conflicting claim, and such conflict is to be excluded, in order to include all ground not so excluded, the end line of the survey may be so established within the conflicting lode claim, but the line must be so run as not to extend any farther into such conflicting claim than may be necessary to make such end line parallel to the other end line, and at the same time embrace the ground so held and claimed. The useless practice in such cases of extending *both* the side lines of a survey into the conflicting claim, and establishing an end line wholly within it, beyond a point necessary under the rule just stated, will be discontinued.

PLACER CLAIMS.

52. The proceedings to obtain patents for claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for

obtaining patents for vein or lode claims; but where said placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required, and all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. But where such claims are located previous to the public surveys, and do not conform to legal subdivisions, survey, plat, and entry thereof may be made according to the boundaries thereof, provided the location is in all respects legal.

53. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims, placer claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

54. By section 2330, authority is given for the subdivision of forty-acre legal subdivisions into *ten-acre* lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands.

55. It is held, therefore, that under a proper construction of the law these ten-acre lots in mining districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a legal claim which conforms to one or more of these ten-acre lots, either adjoining or cornering, may make entry thereof, after the usual proceedings, without further survey or plat.

56. In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the forty-acre tracts may be subdivided into ten-acre lots, either in the form of squares of ten by ten chains, or if parallelograms five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what ten-acre lots are sought to be patented, in addition to the other *data* required in the notice.

57. Where the ten-acre subdivision is in the form of a square, it may be described, for instance, as the "SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$," or, if in the form of a parallelogram as aforesaid, it may be described as the "W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (or the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$) of section —, township —, range —," as the case may be; but, in addition to this description of the land, the notice must give all the other *data* that is required in a mineral application, by which parties may be put on inquiry as to the premises sought to be patented. The proofs submitted with applications for claims of this kind must show clearly the character and the extent of the improvements upon the premises.

Inasmuch as the surveyor-general has no duty to perform in connection with the entry of a placer claim of legal subdivisions, the proof of

improvements must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors. The annual expenditure to the amount of \$100, required by section 2324, Revised Statutes, must be made upon placer claims as well as lode claims.

58. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat; the field-notes and plat giving the area of the lode claim or claims and the area of the placer separately. It should be remembered that an application which omits to include an application for a known vein or lode therein, must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

59. By section 2330, it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

60. Section 2331 provides that all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States systems of public surveys and the subdivisions of such surveys, and no such locations shall include more than twenty acres for each individual claimant.

61. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location made by an individual can exceed twenty acres, and no location made by an association of individuals can exceed one hundred and sixty acres, which location of one hundred and sixty acres cannot be made by a less number than eight *bona fide* locators; and no local laws or mining regulations can restrict a placer location to less than twenty acres, although the locator is not compelled to take so much.

62. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that where placer claims are upon *surveyed* public lands, the locations must hereafter be made to conform to legal subdivisions thereof as near as practicable.

63. The first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands. To this end, the clearest evidence of which the case is capable should be presented.

(1) If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed

placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

(2) Section 2395, Revised Statutes (subdivision 7), requires the surveyor to "note in his field books the true situation of all mines, salt licks, salt springs, and mill seats which come to his knowledge;" also, "all watercourses over which the lines he runs may pass." It further requires him to "note the quality of the lands." These descriptive notes are required by subdivision 8 to be incorporated in the plat by the surveyor-general.

(3) If these duties have been performed, the public surveys will furnish a reasonable guide to the district officers, and to claimants in prosecuting their applications. But experience has shown that great neglect has resulted from inattention to the law in this respect, and the regular plats are of very little value in the matter. It will, therefore, be required in the future that deputy surveyors shall, at the expense of the parties, make full examination of all placer claims surveyed by them, and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claim. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

(4) In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of centres of trade or residence; also of well known systems of lode deposit or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and, finally, what works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(5) This examination should be reported by the deputy under oath to the surveyor-general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof and included in the oath of the applicant.

(6) Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to examination as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

MILL SITES.

64. Section 2337 provides that "where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a

patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site as provided in this section."

65. To avail themselves of this provision of law, parties holding the possessory right to a vein or lode, and to a piece of non-mineral land not contiguous thereto, for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, United States Revised Statutes, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field-notes, may include, embrace, and describe, in addition to the vein or lode, such non-contiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim.

66. In making the survey in a case of this kind, the lode claim should be described in the plat and field-notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from the corner of a mill site to a corner of the lode claim to be invariably given in such plat and field-notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode, for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

67. In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode, the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

68. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable from acquaintance with the land to testify understandingly.

POSSESSORY RIGHT.

69. With regard to the proofs necessary to establish the possessory right to a mining claim, section 2332 provides that "where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the

same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

70. This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

71. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

72. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid, other than that which has been finally decided in favor of the claimant.

73. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

74. As a condition for the making of application for patent according to section 2325, there must be a preliminary showing of work or expenditure upon each location, either by showing the full amount sufficient to the maintenance of possession under section 2324 for the pending year; or, if there has been failure, it should be shown that work has been resumed so as to prevent relocation by adverse parties after abandonment.

The "pending year" means the calendar year in which application is made, and has no reference to a showing of work at date of the final entry.

75. This preliminary showing may, where the matter is unquestioned, consist of the affidavit of two or more witnesses familiar with the facts.

PROOF OF CITIZENSHIP OF MINING CLAIMANTS.

76. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

77. In case of an individual or an association of individuals who do not appear by their duly authorized agent, you will require the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence.

78. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

79. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land district; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any State or Territory.

80. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place, before any person authorized to administer oaths, and whose official character is duly verified.

ADVERSE CLAIMS.

81. Section 2326, and the act of April 26, 1882, provide for adverse claims, fix the time within which they shall be filed to have legal effect, and prescribe the manner of their adjustment, etc.

82. An adverse mining claim must be filed with the register and receiver of the land office where the application for patent was filed, or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant, cognizant of the facts stated.

83. Where an agent or an attorney-in-fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

84. The agent or attorney-in-fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

85. The adverse notice must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a

certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

86. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the approximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party said improvements were made: *Provided, however*, that, if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat.

87. Upon the foregoing being filed within the sixty days as aforesaid, the register, or in his absence the receiver, will give notice in writing to *both parties* to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession; and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits.

88. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

89. Where an adverse claim has been filed and suit thereon commenced within the statutory period, and final judgment determining the right of possession rendered in favor of the applicant, it will not be sufficient for him to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment, but he must, before he is allowed to make entry, file a certified copy of the judgment, together with the other evidence required by section 2326, Revised Statutes.

90. Where such suit has been dismissed, a certificate of the clerk of the court to that effect, or a certified copy of the order of dismissal, will be sufficient.

91. In no case will a relinquishment of the ground in controversy, or other proof, filed with the register or receiver, be accepted in lieu of the evidence required.

92. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the Circuit Court of the United States for the district in which the claim is situated, will be required.

93. A party who is not an applicant for patent under section 2325, Revised Statutes, or the assignee of such applicant, is not entitled to make entry under said section, and in no case will the name of such party be inserted in the certificate of entry. This regulation has no reference to proceedings under section 2326.

94. Any party applying to make entry as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust*; and such trustee, as well as the beneficiaries must furnish satisfactory proof of citizenship; and the names of beneficiaries as well as that of the trustee must be inserted in the final certificate of entry.

95. No entry will be allowed until the register has satisfied himself, by a careful examination, that proper proofs have been filed upon all the points indicated in official regulations in force, and that they show a sufficient *bona fide* compliance with the laws and such regulations.

96. The administration of the mining laws as prescribed by these regulations will be, as far as applicable, adopted for and extended to Alaska.

(1) The *ex-officio* register, receiver, and surveyor-general, while acting as such, and their clerks and deputy surveyors, will be deemed subject to the laws and regulations governing the official conduct and responsibilities of similar officers and persons under general statutes of the United States.

(2) The Commissioner of the General Land Office will exercise the same general supervision over the execution of the laws as are or may be exercised by him in other mineral districts.

APPOINTMENT OF DEPUTY SURVEYORS OF MINING CLAIMS. — CHARGES FOR SURVEYS AND PUBLICATIONS. — FEES OF REGISTERS AND RECEIVERS, ETC.

97. Section 2334 provides for the appointment of surveyors of mineral claims, authorizes the Commissioners of the General Land Office to establish the rates to be charged for surveys and for newspaper publications.

Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases: —

(1) Where a daily newspaper is designated, the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication, five

dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be, in the usual body-type used for advertisements.

(2) For the publication of citations in contests or hearings involving the character of lands, the charges shall not exceed eight dollars for five publications in weekly newspapers, or ten dollars for publications in daily newspapers for thirty days.

98. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many *competent* deputies for the survey of mining claims as may seek such appointment; it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States; the system of making *deposits* for mineral surveys, as required by previous instructions, being hereby revoked as regards *field work*; the claimant having the option of employing any deputy surveyor within such district to do his work in the field.

99. With regard to the *platting* of the claim and other *office work* in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

100. The surveyors-general will endeavor to appoint mineral deputy surveyors, so that one or more may be located in each mining district for the greater convenience of miners.

101. The usual oaths will be required of these deputies and their assistants as to the correctness of each survey executed by them.

The duty of the deputy mineral surveyor ceases when he has executed the survey and returned the field-notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors-general and local land officers are expected to report any infringement of this regulation to this office.

102. The law requires that each applicant shall file with the register and receiver a sworn statement of all charges and fees paid by him for publication of notice and for survey, together with all fees and money paid the register and receiver, which sworn statement is required to be transmitted to this office for the information of the Commissioner.

103. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

104. The fees payable to the register and receiver for filing and acting upon applications for mineral land patents are five dollars to each

officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., paragraph 9.)

105. All fees or charges under this law may be paid in United States currency.

106. The register and receiver will, at the close of each month, forward to this office an abstract of mining applications filed, and a register of receipts, accompanied with an abstract of mineral lands sold, and an abstract of adverse claims filed.

107. The fees and purchase money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

PROCEEDINGS BEFORE THE REGISTER AND RECEIVER AND SURVEYORS-GENERAL IN CONTESTS AND HEARINGS TO ESTABLISH THE CHARACTER OF LANDS.

108. The "Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior," approved August 13, 1885, will, as far as applicable, govern in all cases and proceedings arising in contests, and hearings to determine the mineral or non-mineral character of lands.

109. No public land shall be withheld from entry as agricultural land on account of its mineral character, except such as is returned by the surveyor-general as mineral; and the presumption arising from such a return may be overcome by testimony taken in the manner hereinafter described.

110. Hearings to determine the character of lands are practically of two kinds, as follows:—

(1) When lands are returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper non-mineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for thirty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) When lands which are sought to be entered as agricultural are alleged by affidavit to be mineral or when sought as mineral their non-mineral character is alleged. The proceedings in this class of cases

are in the nature of a contest between two or more known parties and are provided for in the rules of practice.

111. At the hearings under either of the aforesaid classes, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof,—whether of the shallow-surface description or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

112. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

113. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of mineral were first known to exist on the lands.

114. When the case comes before this office, such decision will be made as the law and the facts may justify; and in cases where a survey is necessary to set apart the mineral from the agricultural land, the necessary instructions will be given to enable the proper party *at his own expense* to have the work done, at his option, either by the United States deputy, county, or other local surveyor; the survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, U. S. Revised Statutes, as to length and width and parallel end lines.

115. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

116. Upon the filing of the plat and field-notes of such survey, duly sworn to as aforesaid, you will transmit the same to the surveyor-general for his verification and approval; who, if he finds the work

correctly performed, will properly mark out the same upon the original township plat in his office, and furnish authenticated copies of such plat and description both to the proper local land office and to this office, to be affixed to the duplicate and triplicate township plats respectively.

117. With the copy of plat and description furnished the local office and this office, must be a diagram tracing, verified by the surveyor-general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the same as provided in paragraph 45, in the survey of mining claims on surveyed lands.

118. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. A miner is compelled by law to give sixty days' publication of notice, and posting of diagrams and notices, as a preliminary step; and then, before he can enter the land, he must show that the land yields mineral; that he is entitled to the possessory right thereto in virtue of compliance with local customs or rules of miners, or by virtue of the statute of limitations; that he or his grantors have expended, in actual labor and improvements, an amount of not less than five hundred dollars thereon, and that the claim is one in regard to which there is no controversy or opposing claim. After all of these proofs are met, he is entitled to have a survey made at his own cost where a survey is required, after which he can enter and pay for the land embraced by his claim.

119. Blank forms for proofs in mineral cases are not furnished by the General Land Office.

ADDENDA.

THE text of the following recent statutes did not reach the authors until the first pages of this work had been electrotyped.

The California Act of March 27, 1897, c. 159, p. 216, prescribes with great particularity the manner of locating mining claims in that State, and should be consulted in reference to every point in connection therewith. Reference to this act should be added to pp. 216 n. 1, 223 n. 1, 228 n. 1, 235 n. 1, 239 n. 1, 243 n. 1, 244 n. 1, 250 n. 1.

Idaho, Act March 2, 1897, p. 12, should be added to pp. 216 n. 1, 223 n. 1, 228 n. 1, 235 n. 1, 243 n. 1, 250 n. 1.

Kansas, Act March 13, 1897, c. 159, p. 339, should be added to p. 780 n. 1.

New Mexico, Act March 18, 1897, c. 58, p. 124, should be added to pp. 223 n. 1, 228 n. 1, 236 n. 1, 267 n. 1, 282 n. 1.

New York, Laws 1897, c. 415, secs. 120-129, pp. 487-489, should be added to pp. 719 n. 3, 780 n. 1.

Pennsylvania, Act July 15, 1897, P. L. 286, should be added to p. 766 n. 3.

Washington, Act March 16, 1897, c. 83, p. 221, should be added to pp. 223 n. 4, 236 n. 1.

Washington, Act March 17, 1897, c. 102, p. 293, should be added to p. 194 n. 2.

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